DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-212
Title: United States, Petitioner
v.
Brima Wurie
Docketed: August 15, 2013
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (11-1792)
Decision Date: May 17, 2013

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Aug 15 2013	Petition for a writ of certiorari filed. (Response due September 16, 2013)
Sep 6 2013	Order extending time to file response to petition to and including October 16, 2013.
Oct 8 2013	Order further extending time to file response to petition to and including November 15, 2013.
Nov 15 2013	Brief of respondent Brima Wurie in opposition filed.
Nov 15 2013	Motion for leave to proceed in forma pauperis filed by respondent Brima Wurie.
Nov 20 2013	DISTRIBUTED for Conference of December 6, 2013.
Nov 20 2013	Reply of petitioner United States filed. (Distributed)
Dec 31 2013	DISTRIBUTED for Conference of January 17, 2014.
Jan 17 2014	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 17 2014	Petition GRANTED.
Feb 11 2014	SET FOR ARGUMENT ON Tuesday, April 29, 2014
Feb 21 2014	Record received from U.S.C.A. 1st Circuit, (1 envelope) part of this record is SEALED. All other filings of this record is available electronically through PACER.
Mar 3 2014	Joint appendix filed.
Mar 3 2014	Brief of petitioner United States filed.
Mar 5 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from the respondent.
Mar 6 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Mar 7 2014	Brief amici curiae of Criminal Law Professors in support of private parties filed. VIDED. (Distributed)
Mar 10 2014	CIRCULATED.
Mar 10 2014	Brief amici curiae of Center for Democracy & Technology, and Electronic

	Frontier Foundation in support of Riley and Wurie filed. VIDED. (Distributed)
Mar 10 2014	Brief amici curiae of American Library Association, and The Internet Archive in support of Riley and Wurie filed. VIDED. (Distributed)
Mar 10 2014	Brief amici curiae of National Press Photographers Association, et al. filed. VIDED. (Distributed)
Mar 10 2014	Brief amici curiae of Professors Charles E. MacLean & Adam Lamparello filed. VIDED. (Distributed)
Mar 10 2014	Brief amicus curiae of Constitutional Accountability Center in support of Riley and Wurie filed. VIDED. (Distributed)
Apr 2 2014	Brief of respondent Brima Wurie filed. (Distributed)
Apr 9 2014	Brief amici curiae of National Association of Federal Defenders, et al., filed. (Distributed).
Apr 9 2014	Brief amici curiae of Downsize DC Foundation, et al., filed. (Distributed).
Apr 9 2014	Brief amicus curiae of Cato Institute filed. (Distributed)
Apr 9 2014	Brief amici curiae of Southwestern Law Student Anna Aran, et al. filed. (Distributed)
Apr 9 2014	Brief amicus curiae of The Rutherford Institute filed. (Distributed)
Apr 22 2014	Reply of petitioner United States filed. (Distributed)
Apr 29 2014	Argued. For petitioner: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondent: Judith H. Mizner, Assistant Federal Public Defender, Boston, Mass.
Jun 25 2014	Adjudged to be AFFIRMED. Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in part and concurring in the judgment. VIDED with No. 13-132.
Jul 28 2014	JUDGMENT ISSUED.
Jul 28 2014	Record returned for U.S.C.A. for First Circuit.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
AUG 15 2013
OFFICE OF THE CLERK

No. 13-212

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BRIMA WURIE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police, without obtaining a warrant, to review the call log of a cell phone found on a person who has been lawfully arrested.

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BRIMA WURIE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-51a) is not yet reported but is available at 2013 WL 2129119. The opinion of the district court (App., *infra*, 54a-69a) is reported at 612 F. Supp. 2d 104.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2013. A petition for rehearing was denied on July 29, 2013 (App., *infra*, 70a-73a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, respondent was found guilty of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g); distributing crack cocaine, in violation of 21 U.S.C. 841(a); and possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a). App., *infra*, 4a. He was sentenced to 262 months in prison. *Ibid.* The court of appeals vacated his convictions on two of the counts on the ground that evidence had been admitted at trial in violation of the Fourth Amendment and remanded for resentencing on the remaining count. See *id.* at 1a-31a.

1. On September 5, 2007, a police officer noticed respondent make an apparent drug sale out of his car that the officer believed to have been arranged by cell phone. App., *infra*, 2a, 56a. After the transaction, the officer confronted the buyer and found two bags of crack cocaine in his pocket. *Id.* at 2a. The buyer told the officer that he had purchased the drugs from "B," the driver of the car, who was a crack dealer living in South Boston. *Ibid.* Officers following respondent then arrested him for drug distribution, read him the *Miranda* warnings,

and drove him to a nearby police station, where they seized two cell phones, a set of keys, and more than one thousand dollars in cash from his person. *Id.* at 2a, 57a.

Five to ten minutes after respondent arrived at the station, officers noticed that one of respondent's cell phones, a "flip" phone that a user must open to make calls, was repeatedly receiving calls from a number identified as "my house" on the phone's external screen. App., *infra*, 2a. Minutes later, the officers opened the phone to check its call log. *Id.* at 2a-3a. They saw a photo of a woman holding a baby set as the internal screen's "wallpaper." *Id.* at 3a. The officers pressed one button to navigate to the phone's call log, then pressed another button to obtain the number for "my house." *Ibid.* They did not view any other information stored on the phone.

The officers typed the number for "my house" into an online directory and learned that it was associated with an address on Silver Street in South Boston near where respondent had parked his car before his arrest. App., *infra*, 3a. After giving a second set of *Miranda* warnings, the officers then further questioned respondent, who denied his participation in the drug deal and claimed to reside at an address that was not the Silver Street address. *Ibid.* Given the amount of cash respondent had been carrying and his possession of two cell phones (a practice known to the police to be common among drug dealers), the officers suspected that respondent kept a "hidden mother cache" of crack cocaine at an address other than the one he had identified during questioning. *Id.* at 58a-59a.

Accordingly, the officers drove to the Silver Street address, where they found a mailbox labeled with respondent's name and observed through the window of a

first-floor apartment a woman who closely resembled the woman in the wallpaper on respondent's phone. App., *infra*, 3a-4a. The officers then obtained and executed a search warrant for the apartment. *Id.* at 4a. They ultimately seized crack cocaine, marijuana, cash, a firearm, and ammunition from inside. *Ibid.*

2. Respondent was charged with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g) (Count 1); distributing crack cocaine, in violation of 21 U.S.C. 841(a) (Count 2); and possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a) (Count 3). App., *infra*, 4a. He moved to suppress the evidence obtained from the search of the apartment, arguing that it was the fruit of the unconstitutional search of his cell phone's call log. See *ibid.*

The government opposed respondent's motion on the ground that under the search-incident-to-arrest doctrine set forth in *United States* v. *Robinson*, 414 U.S. 218 (1973), and *United States* v. *Edwards*, 415 U.S. 800 (1974), an arresting officer may seize and search any items found on an arrestee's person, including closed containers. See Gov't Opp. to Mot. to Suppress 10-16, 08-10071 Docket entry No. 21 (D. Mass. Oct. 16, 2008). That longstanding categorical rule, the government explained, alone sufficed to justify the search of respondent's cell phone. But the government further explained that the particular search conducted in this case was unquestionably reasonable because it "was substantially contemporaneous with and in close proximity to the scene of the defendant's arrest, and limited to discovering information pertinent to the ongoing drug investigation." *Id.* at 15. "While officers could arguably have searched [respondent's] entire phone," it said, "they limited [the search] to gathering information specific to the

ongoing drug investigation, i.e., the location of his residence." *Id.* at 16.

The district court denied respondent's motion to suppress. See App., *infra*, 63a-69a. The court explained that under *Robinson*, the police may conduct "[a] full search of the person [of an arrestee], his effects, and the area within his immediate reach * * * without regard to any exigency or the seriousness of the offense, and regardless of any probability that the search will yield a weapon or evidence of the crime for which the person is arrested." *Id.* at 62a. Further, it stated, the police need not conduct such a search immediately upon arrest. Rather, officers may conduct the search "when the accused arrives at the place of detention." *Ibid.* (quoting *Edwards*, 415 U.S. at 803).

In light of those principles, the district court held that "[t]he search of [respondent's] cell phone incident to his arrest was limited and reasonable." App., *infra*, 66a. "The officers, having seen the 'my house' notation on [respondent's] caller identification screen, reasonably believed that the stored phone number would lead them to the location of [respondent's] suspected drug stash." *Ibid.* The court found "no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant's person." *Id.* at 66a-67a.

A jury convicted respondent on all three counts. See App., *infra*, 4a. The district court sentenced him to concurrent terms of 262 months on Counts 1 and 3 and 240 months on Count 2. See *ibid.*; Judgment 2, 08-10071 Docket entry No. 82 (D. Mass. June 30, 2011).

3. A divided panel of the court of appeals reversed the district court's denial of respondent's suppression motion and vacated his convictions on Counts 1 and 3.

See App., *infra*, 1a-51a. In so doing, the court fashioned what it described as a "bright-line rule" that "the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person" in any circumstances. *Id.* at 13a, 27a-28a.[1]

The court of appeals began by acknowledging that in *Robinson*, this Court had set forth a "straightforward rule, easily applied, and predictably enforced," that items found on the person of an arrestee may be searched incident to a lawful arrest and had emphasized that the rule was designed to avoid case-by-case determinations of whether a particular search incident to arrest was lawful. App., *infra*, 12a-13a, 25a (citation omitted). The court also agreed with the government that the *Robinson* rule authorizes the police to search the contents of containers, such as briefcases and wallets. *Id.* at 20a. But despite those settled principles, the court concluded that *Robinson* did not foreclose treating cell phones "as a category" different from other containers. *Id.* at 15a. It found support for such an item-by-item exception to *Robinson* in this Court's decisions holding that the police do not have blanket authority to search areas outside of the immediate control of the arrestee. See *ibid.* (citing *United States* v. *Chadwick*, 433 U.S. 1 (1977), abrogated on other grounds by *California* v. *Acevedo*, 500 U.S. 565 (1991); *Arizona* v. *Gant*, 556 U.S. 332 (2009)).

The court of appeals accordingly undertook an inquiry into whether "the warrantless search of data within a cell phone can ever be justified" by the two ration-

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[1] The court of appeals explained that the government had "not argued that the search here was justified by exigent circumstances or any other exception to the warrant requirement." App., *infra*, 1a.

ales for the search-incident-to-arrest exception articulated in *Chimel* v. *California*, 395 U.S. 752 (1969)—officer safety and the preservation of evidence. App., *infra*, 21a. It rejected the government's argument that the search of a cell phone is necessary to prevent the destruction of the data stored on the phone. The government had explained that defendants or their confederates have the ability to "remotely wipe" the contents of a cell phone or to overwrite its call log before the police can search it. See *id.* at 23a-24a. But the court believed that it is "not * * * particularly difficult" for police to prevent those tactics by turning the phone off, removing its battery, placing it in a "Faraday enclosure" (an aluminum container that blocks the cell phone from receiving wireless signals), or blindly copying its contents. See *id.* at 23a-24a. It therefore concluded that the government's concern that evidence on a cell phone could quickly be destroyed was merely "theoretical" and thus insufficient to satisfy the Fourth Amendment when "[w]eighed against the significant privacy implications inherent in cell phone data searches." *Id.* at 24a. The court of appeals acknowledged that its holding conflicted with the published decisions of three other circuits and two state supreme courts, including the highest court of Massachusetts, the State in which respondent was arrested. See *id.* at 10a-11a, 26a-27a.

Judge Howard dissented, explaining that "this case requires us to apply a familiar legal standard to a new form of technology." App., *infra*, 31a. Canvassing the pertinent precedents of this Court, Judge Howard concluded that those cases "establish that items immediately associated with the arrestee—as a category—may be searched without any *Chimel* justification." *Id.* at 43a. "The majority," he said, "seeks a bright-line rule to gov-

ern cell phone searches, but denies the fact that such a rule—covering all items on the arrestee's person—already exists." *Ibid.*

Judge Howard recognized "concerns about the privacy interests at stake in cell phone searches" given the amount of personal information that a modern phone can store. App., *infra*, 47a. But rather than addressing those concerns through a blanket prohibition on cell-phone searches, he would have adopted an approach suggested by *United States* v. *Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012) (Posner, J.), under which courts would balance the intrusiveness of the search against the law-enforcement interest in conducting it. App., *infra*, 47a-48a. He considered that approach, which would bar "'extreme or patently abusive' searches," to be "consistent with the core reasonable[ness] limit" of the Fourth Amendment. *Id.* at 48a (quoting *Robinson*, 414 U.S. at 236).

Judge Howard ultimately determined, however, that the question of what constitutes an "unreasonable cell phone search should be left for another day," because the limited search here was clearly reasonable. App., *infra*, 50a. "Courts," he said, "have regularly upheld warrantless searches of nearly identical information in a range of 'containers'" found on the person of an arrestee, including pagers, wallets, and address books. *Id.* at 33a. He believed that the search of respondent's cell phone was "even less intrusive than the searches in these cases" because it was conducted for "the limited purpose of retrieving the actual phone number associated with 'my house.'" *Id.* at 33a-34a.

4. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 70a.[2] Chief Judge Lynch and Judge Howard, however, each issued statements explaining that although the case met the criteria for en banc review, "the preferable course is to speed this case to the Supreme Court for its consideration." *Id.* at 71a (Lynch, C.J.) (statement on denial of rehearing en banc). Chief Judge Lynch observed that "[t]he decision in this case creates a circuit split with respect to the validity of warrantless searches of cell phones incident to arrest" and that "[s]tate courts similarly are divided." *Ibid.* From a practical standpoint, she said, "the differing standards which the courts have developed provide confusing and often contradictory guidance to law enforcement." *Ibid.* She emphasized in particular that "the highest court in the state which this case arose"—Massachusetts—"has taken a view of the law that is contrary to the decision in this case, leaving the police in need of further guidance." *Ibid.*

For his part, Judge Howard contended that the court of appeals had positioned itself as "an outlier in this field" but that "this issue requires an authoritative answer from the Supreme Court." App., *infra*, 72a (Howard, J.) (statement on denial of rehearing en banc). He also argued that his "dissent looks better in light of the Supreme Court's recent opinion in *Maryland v. King*, 133 S. Ct. 1958 (2013), in which the Court held as consti-

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[2] Shortly after denying rehearing, the court of appeals entered an order clarifying that its judgment did not vacate respondent's conviction on Count 2. See App., *infra*, 52a. Respondent has filed a motion seeking reconsideration of that order. Regardless of how the court of appeals rules on respondent's motion for reconsideration, however, his convictions on Counts 1 and 3 have been definitively vacated and those counts carried heavier sentences than Count 2. See p. 5, *supra*.

tutional Maryland's practice of swabbing violent-crime arrestees for DNA samples." App., *infra*, 71a-72a. *King*, he said, had "reaffirmed the core holding in [*Robinson*]—that the search of a person and items in his immediate control incident to an arrest requires no independent justification other than the arrest itself." *Id.* at 72a. Indeed, he noted, the search of respondent's cell phone would have been constitutional even under the *King* dissent, which stated that police may conduct a search incident to arrest for any "evidence relevant to the crime of arrest." *Ibid.* (quoting *King*, 133 S. Ct. at 1982 (Scalia, J., dissenting)).

REASONS FOR GRANTING THE PETITION

It is settled law that a custodial arrest based on probable cause justifies a full search of an arrestee and any items found on him—including items such as wallets, calendars, address books, pagers, and pocket diaries. The court of appeals nevertheless carved out an exception to that doctrine for cell phones, holding categorically that the police may not search the contents of a cell phone discovered on the person of an arrestee as an incident of his arrest. That decision cannot be reconciled with this Court's decisions in *United States* v. *Robinson*, 414 U.S. 218 (1973), and *United States* v. *Edwards*, 415 U.S. 800 (1974), which establish an across-the-board rule that the police may search any items found on the person of an arrestee so long as the search is not conducted in an unreasonable manner. As the court of appeals acknowledged, its decision also creates a square conflict with the Fourth, Fifth, and Seventh Circuits and state supreme courts, including the Supreme Judicial Court of Massachusetts, leaving law-enforcement officers in that State the task of making sense of conflicting legal rules. Particularly given the

ubiquity of cell-phone use by drug traffickers and other serious offenders, and the important law-enforcement consequences of unsettling search-incident-to-arrest doctrine, the question presented now "requires an authoritative answer from the Supreme Court." App., *infra*, 72a (Howard, J.) (statement on denial of rehearing en banc).

A. The Search Of The Call Log Of Respondent's Cell Phone Complied With The Fourth Amendment

1. The search-incident-to-arrest doctrine authorizes police officers to search a cell phone found on the person of an arrestee

The court of appeals adopted a "bright-line rule" that the search-incident-to-arrest doctrine never permits the police to search the contents of a cell phone found on the person of an arrestee without first obtaining a warrant. App., *infra*, 13a, 27a-28a. That rule conflicts with this Court's decisions in *Robinson* and *Edwards*. Those cases establish the opposite bright-line rule: that a lawful arrest authorizes the police to search any item found on the person of an arrestee. Not only would item-by-item exceptions erode and complicate that rule, but no sound reason justifies excluding cell phones, the contents of which are far more susceptible to destruction than most other evidence.

a. *Robinson* and *Edwards* together establish that police officers may search any item found on the person of an arrestee, even where the search is conducted after the arrestee has been taken into custody. That rule rests not only on the important objectives of preserving destructible evidence and protecting officer safety, but also on an arrestee's diminished expectation of privacy

and the need for clear rules to guide law-enforcement officers' on-the-spot decisionmaking in arrest situations.

i. In *Robinson*, a police officer had detected an object in the breast pocket of the defendant during his arrest. See 414 U.S. at 223. The officer removed the object from the pocket and, after seeing that it was a crumpled cigarette package, opened it, discovering heroin capsules. See *ibid.* This Court held that the search was lawful under the search-incident-to-arrest doctrine. "Having in the course of a lawful search come upon the crumpled package of cigarettes," the Court concluded, the officer "was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct." *Id.* at 236.

Reviewing "the history of practice in this country and in England," the Court explained that law-enforcement officers historically have possessed "unqualified authority" to search "the *person* of the arrestee by virtue of the lawful arrest." *Robinson*, 414 U.S. at 224, 235. It therefore rejected the proposition that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting" the exception identified in *Chimel* v. *California*, 395 U.S. 752, 762-763 (1969)—*i.e.*, to remove objects that might harm officers or aid an escape attempt and to seize evidence that might be destroyed. 414 U.S. at 235. Rather, "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Ibid.*

Edwards built on *Robinson* to hold that police may conduct a search incident to arrest of objects found on an arrestee after detaining him and taking him to the station house. In *Edwards*, the defendant had been arrested late at night for attempted burglary and brought to jail. See 415 U.S. at 801. The next morning, without obtaining a warrant, officers removed the defendant's clothes and sent them to a forensic lab to determine whether they contained paint chips linking him to the crime. See *id.* at 802, 805. This Court upheld the search, holding that "both the person and the property in [an arrestee's] immediate possession may be searched at the station house after the arrest has occurred at another place and if evidence of crime is discovered, it may be seized and admitted in evidence." *Id.* at 803. "[T]he legal arrest of a person," the Court said, "for at least a reasonable time and to a reasonable extent[,] take[s] his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." *Id.* at 808-809 (citation omitted). The *Robinson* rule thus rests as much on the "reduced expectations of privacy caused by the arrest" as it does on the need to protect officers and preserve evidence. *United States* v. *Chadwick*, 433 U.S. 1, 16 n.10 (1977), abrogated on other grounds by *California* v. *Acevedo*, 500 U.S. 565 (1991); see also *Robinson*, 414 U.S. at 237 (Powell, J., concurring).

ii. *Robinson* and *Edwards* resolve this case. They establish, contrary to the view of the court of appeals, that the police may search any items found on the person of an arrestee "whether or not there [is] present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Robinson*, 414 U.S. at 235. This Court reaffirmed just last Term in

Maryland v. *King*, 133 S. Ct. 1958 (2013), that the "constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence." *Id.* at 1971 (citation omitted). The court of appeals thus erred in undertaking an analysis of whether the *Chimel* rationales support cell-phone searches. Rather, "[t]he fact of a lawful arrest, standing alone, authorize[d] [the] search" here. *Ibid.* (citation omitted).

The facts of *Robinson* and *Edwards* make clear that the police have full authority not only to seize any object they find on an arrestee, but also to search its contents. In both cases, the fact that evidence of crime was contained in the object seized—a crumpled cigarette package and the arrestee's clothing, respectively—was not known to the police until a further search of the object's contents. Indeed, in *Edwards*, the clothing was subjected to a forensic analysis, see 415 U.S. at 805, yet this Court had little trouble concluding that the search did not require a warrant. The limited search of the call log of respondent's cell phone, which officers had reason to believe might reveal the likely location of respondent's drug stash, is materially indistinguishable from those searches.

The court of appeals acknowledged that *Robinson* "sp[oke] broadly" and that this Court has never suggested that courts of appeals are empowered to fashion exceptions to *Robinson* based on their view that particular categories of searches do not sufficiently implicate the interests in officer safety and evidence preservation. App., *infra*, 19a. But rather than applying that settled law, the court relied on two decisions of this Court addressing a different question entirely: whether the police may search items "*not* within [the arrestees'] imme-

diate control." *Chadwick*, 433 U.S at 14 (emphasis added); see also *Arizona* v. *Gant*, 556 U.S. 332, 335 (2009). As this Court explained in *Robinson*, greater scrutiny is required for searches of items found nearby an arrestee, although not on his person, to ensure that they are supported by the rationales of the exception. See 414 U.S. at 224; see also App., *infra*, 41a (Howard, J., dissenting). But this Court has never expressed doubt "as to the unqualified authority of the arresting authority to search the person of the arrestee," *Robinson*, 414 U.S. at 225, given the "reduced expectations of privacy caused by the arrest," *Chadwick*, 433 U.S. at 16 n.10. By creating an exception to that "unqualified authority," the decision below squarely conflicts with this Court's precedents.

b. Even if, as the court of appeals believed, *Robinson* and *Edwards* could be read to allow courts to fashion exceptions for certain categories of items found on the person of an arrestee, no sound reason justifies excluding cell-phone searches from the general rule. Cell-phone searches, in fact, are far more critical to preserving destructible evidence than was the search of the cigarette package in *Robinson* or the clothing in *Edwards*. Unlike those items, which could have been seized and stored while police obtained a search warrant to examine their contents, a significant risk exists that evidence contained on a cell phone could be destroyed by an arrestee's confederates before the police have the opportunity to obtain a warrant. Commonly known techniques enable co-conspirators without physical access to a cell phone to erase information stored on it, such as the record of numbers called or incriminating text messages. As the Seventh Circuit has explained, "remote-wiping capability is available on all major cell-phone platforms; if the phone's manufacturer doesn't offer it, it

can be bought from a mobile-security company." *United States* v. *Flores-Lopez*, 670 F.3d 803, 808-809 (2012).

The court of appeals dismissed those risks because the government can take measures to prevent them, such as placing a cell phone in a "Faraday enclosure." See App., *infra*, 23a-24a. That speculation ignored "the burden on the police of having to traipse about with Faraday bags or [other] technology and having to be instructed in the use of these methods for preventing remote wiping or rendering it ineffectual." *Flores-Lopez*, 670 F.3d at 810. And in any event, as Judge Howard pointed out, the court's argument could be made for *any* item found on an arrestee. See App., *infra*, 44a. Certainly the police could take far simpler measures to prevent the destruction of the contents of cigarette packages or clothing. The court's analysis thus amounts to a wholesale rejection of this Court's settled jurisprudence.

c. The court of appeals expressed concern that cell-phone searches are not "self-limiting," by which it appeared to mean that computer-like cell phones, such as the iPhone, can store a large amount of personal information. App., *infra*, 20a, 26a. But nothing in this Court's precedents supports addressing that concern through the blanket prohibition on cell-phone searches that the court of appeals imposed. Individuals may carry a large amount of personal information in paper form as well, in briefcases, purses, diaries, or letters. Yet no categorical exception exists for such written material. It would be anomalous to provide arrestees who use more sophisticated technology a special protection from police investigation that does not apply to those who keep records of their criminal activity with only pen and paper.

Although a valid search incident to arrest does not require a warrant, that "does not leave law enforcement

officials subject to no restraints," because the search "'must [still] be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.'" *Edwards*, 415 U.S. at 808 n.9 (quoting *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968)). As the Seventh Circuit has observed, if officers may be found to act unreasonably in violation of the Fourth Amendment by reading highly personal papers found during a search of a person incident to arrest, similar principles could apply to cell-phone searches. See *Flores-Lopez*, 670 F.3d at 807. But whatever limits might exist, the search here did not approach them. As Judge Howard explained, the officers "conducted a focused and limited search of [respondent's] electronic call log," and "[i]f the information that they sought had been written on a piece of paper, as opposed to stored electronically, there would be no question that the police acted constitutionally." App., *infra*, 35a-36a.

2. ***Even if cell-phone searches do not fall under the*** **Robinson** ***rule, the court of appeals erred in imposing a blanket prohibition***

Even if the court of appeals were correct that cell phones should be excluded from *Robinson*'s holding, it erred in establishing a blanket prohibition on warrantless searches of cell phones incident to arrest and in concluding that the search here violated the Fourth Amendment. The court's novel rule "is simply without precedent." App., *infra*, 72a (Howard, J.) (statement on denial of rehearing).

a. At a minimum, the court of appeals erred by overriding not only *Robinson*'s categorical rule permitting searches of containers found on the person, but also the narrower principle that "[t]he objects of a search incident to arrest must be either (1) weapons or evidence

that might easily be destroyed, or (2) *evidence relevant to the crime of arrest.*" *King*, 133 S. Ct. at 1982 (Scalia, J., dissenting) (emphasis added). Under *Robinson*, that separate authority to search for evidence relevant to the crime of arrest normally does not come into play, because the police may categorically search all containers found on the person (whether or not the container may yield evidence of the crime of arrest). See *Robinson*, 414 U.S. at 234; *Gustafson* v. *Florida*, 414 U.S. 260, 263-264 (1973). But in *Gant*, where searches of a vehicle incident to an occupant's arrest are governed by a more limited principle, this Court did rely on that authority, holding that officers may search the vehicle when the arrestee is within reaching distance *or* when "it is reasonable to believe the vehicle contains evidence of the *offense of arrest*." *Gant*, 556 U.S. at 351 (emphasis added). Thus, a search for evidence of the crime of arrest is permissible even if the vehicle is no longer within an arrestee's reaching distance (because, for example, he is handcuffed in a squad car), and so the interests in preserving evidence and protecting officers are not implicated. *Id.* at 335.

If it were thought that cell phones justified an exception to *Robinson*'s rule, *Gant*'s reasoning would support the search of the contents of a cell phone where, as here, the police have reason to believe that it might contain or lead to evidence relevant to the offense of arrest. In this case, the district court found that "[t]he officers, having seen the 'my house' notation on [respondent's] caller identification screen, reasonably believed that the stored phone number would lead them to the location of [respondent's] suspected drug stash." App., *infra*, 66a. Indeed, respondent had been observed immediately before his arrest conducting a drug deal that officers be-

lieved to have been arranged by cell phone. See *id.* at 56a-57a. Even the court of appeals acknowledged that police are likely to use cell-phone searches to look for evidence relevant to the crime of arrest. See *id.* at 28a. But although the government argued that a reasonable belief that the search would turn up evidence of the offense of arrest was sufficient to render it reasonable under the reasoning of *Gant*, see Gov't C.A. Br. 40-41, the court implicitly rejected even that narrower approach.

b. This Court's recent decision in *King* also supports the limited cell-phone search in this case. As the facts of this case illustrate, the search of a cell phone can reveal that a suspect has been lying about basic identifying information, such as his name, address, and phone number. In *King*, decided after the court of appeals' decision, this Court upheld the warrantless DNA testing of persons arrested for serious crimes, relying on the government's important interest in identifying an arrestee, including verifying his name and determining his criminal history, and the arrestee's diminished expectation of privacy in his person. See 133 S. Ct. at 1971.

Like a DNA test, the search of a cell phone's call log can provide "metric[s] of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police." *King*, 133 S. Ct. at 1972. That can increase the accuracy and efficiency of identifying an arrestee who is subject to detention. See *ibid.* The government raised the intervening decision in *King* in its petition for rehearing, but the court of appeals refused to reconsider its decision in light of that new controlling precedent.

B. The Decision Below Conflicts With Decisions Of The Fourth, Fifth, And Seventh Circuits And Three State Supreme Courts

As the court of appeals acknowledged, its categorical rule conflicts with the published decisions of three other courts of appeals. App., *infra*, 10a-11a, 26a-27a. It also conflicts with the decisions of three state supreme courts, including the Supreme Judicial Court of Massachusetts, leaving law-enforcement officers in that State with "confusing and * * * contradictory guidance" from federal and state courts. *Id.* at 71a (Lynch, C.J.) (statement on denial of rehearing en banc). This Court should grant review to resolve that conflict.

1. Two courts of appeals have held that the warrantless search of the contents of a cell phone found on the person of an arrestee is categorically lawful under the Fourth Amendment. In *United States* v. *Finley*, 477 F.3d 250 (5th Cir.), cert. denied, 549 U.S. 1353 (2007), the police arrested the defendant for participating in a drug transaction and found a cell phone in his pocket. See *id.* at 253-254. During the defendant's interrogation, a DEA agent searched the phone's call records and text messages and determined that several of the messages related to drug trafficking. See *id.* at 254. In holding that the search complied with the Fourth Amendment, the Fifth Circuit explained that it is "well settled" that police can conduct a warrantless search of the person of an arrestee and "are not constrained to search only for weapons or instruments of escape," but "may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial." *Id.* at 259-260. Moreover, it explained, "[t]he permissible scope of a search incident to arrest extends to containers found on the ar-

restee's person." *Id.* at 260 (citing, *inter alia*, *Robinson*, 414 U.S. at 223-224). It therefore rejected the defendant's argument that "the police had no authority to examine the phone's contents without a warrant." *Ibid.*

The Fourth Circuit adopted *Finley*'s holding in *United States* v. *Murphy*, 552 F.3d 405, cert. denied, 129 S. Ct. 2016 (2009). In that case, the defendant was arrested along with two other occupants of the vehicle in which he was riding. See *id.* at 408. When officers conducted an inventory search of the vehicle, they found counterfeit bills and drug residue, as well as the defendant's cell phone, all of which they transferred to the DEA. See *id.* at 409. Twenty-three days later, a DEA agent examined the contents of the cell phone and found text messages to another individual, who later identified the defendant as a drug dealer. See *ibid.* After concluding that reasonable grounds existed "to infer that [the defendant] had the cell phone in his possession at the time of his arrest," *id.* at 410, the Fourth Circuit held that "officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest," *id.* at 411. The court explained that "the need for the preservation of evidence justifies the retrieval of call records and text messages from a cell phone or pager without a warrant during a search incident to arrest." *Ibid.*

Unlike the court of appeals here, the Fourth Circuit refused to create a cell-phone exception from *Robinson* premised on the view that a phone with a large storage capacity would "implicate a heightened expectation of privacy." *Murphy*, 552 F.3d at 411. Information on a high-capacity cell phone, the court explained, might be equally susceptible to destruction as information on low-capacity phones. *Ibid.* Of particular relevance here, the

court found that "in the time it takes for officers to ascertain a cell phone's particular storage capacity, the information stored therein could be permanently lost." *Ibid.*[3]

The Seventh Circuit has also upheld a limited search of a cell phone found on an arrestee comparable to the search at issue here. In *Flores-Lopez*, *supra*, officers searched a cell phone found on an arrestee to determine its own number and used that information to subpoena the phone's call-history records from the telephone company. See 670 F.3d at 804-805. The Seventh Circuit agreed that "a fair literal reading of the *Robinson* decision" supported the view that "a cell phone seized as an incident to an arrest can * * * be freely searched." *Id.* at 805. But it declined to decide whether any limits on that authority exist given the nature of the specific search at issue in the case, which the court analogized to "opening the diary found on the suspect whom the police have arrested, to verify his name and address and discover whether the diary contains information relevant to the crime for which he has been arrested." *Id.* at 807. That minimal intrusion, the court held, was not unreasonable in light of the officers' "imperative" need "to immediately search or retrieve, incident to a valid arrest, information from a [phone] in order to prevent its destruction as evidence." *Id.* at 808-809 (internal quotation marks and citation omitted).

In the decision below, the court of appeals acknowledged that its holding conflicts with these decisions of

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[3] In an unpublished decision arising out of a Section 1983 lawsuit, the Tenth Circuit joined the Fourth and Fifth Circuits in holding that "the permissible scope of a search incident to arrest includes the contents of a cell phone found on the arrestee's person." *Silvan* v. *Briggs*, 309 Fed. Appx. 216, 225 (10th Cir. 2009).

the Fourth, Fifth, and Seventh Circuits. See App., *infra*, 10a-11a, 26a-27a; see also *id.* at 36a (Howard, J., dissenting). Chief Judge Lynch likewise observed that the panel's decision "create[d] a circuit split with respect to the validity of warrantless searches of cell phones incident to arrest." App., *infra*, 71a (statement on denial of rehearing). Given that the court of appeals made clear that it was adopting a "bright-line rule" barring searches of cell phones under the search-incident-to-arrest exception in any circumstances and that the court denied rehearing en banc, the circuit conflict is highly unlikely to be resolved without this Court's intervention.

2. State appellate courts are similarly divided over whether police may search the contents of a cell phone incident to arrest. The Georgia and California Supreme Courts have upheld such searches, while the Florida and Ohio Supreme Courts, employing reasoning similar to the decision below, have not. Compare *Hawkins* v. *State*, 723 S.E.2d 924, 925-926 (Ga. 2012); *People* v. *Diaz*, 244 P.3d 501, 503-511 (Cal.), cert. denied, 132 S. Ct. 94 (2011); with *Smallwood* v. *State*, 113 So.3d 724, 734-738 (Fla. 2013); *State* v. *Smith*, 920 N.E.2d 949, 952-955 (Ohio 2009), cert. denied, 131 S. Ct. 102 (2010).

Most pertinently, the Supreme Judicial Court of Massachusetts, that State's highest court, has upheld the warrantless search of a cell phone's call log under *Robinson* and *Edwards*. See *Commonwealth* v. *Phifer*, 979 N.E.2d 210 (2012); *Commonwealth* v. *Berry*, 979 N.E.2d 218 (2012). It has held that "[w]hatever may be said of a cellular telephone search in other contexts, * * * [a] limited search of the recent call list on [a] defendant's cellular telephone [is] permissible," at least where the police have "probable cause to believe the telephone's recent call list would contain evidence relating

to the crime for which he was arrested." *Phifer*, 979 N.E.2d at 214-216; see also *Berry*, 979 N.E.2d at 223 (upholding "a very limited search of the cellular telephone" in which the police "press[ed] one button to view the recent call list, read[] the most recent telephone number displayed, and call[ed] it"). That is the same type of search that the court of appeals held unconstitutional in this case.

The court of appeals' rule thus effectively subjects law-enforcement officers in Massachusetts to two different legal regimes depending on which sovereign ultimately prosecutes the arrestee. Because federal prosecutions often rely on evidence obtained by state police, the court's holding puts officers in the difficult position of having to predict whether an arrestee will be prosecuted by federal or Massachusetts authorities in deciding whether to immediately examine the contents of a cell phone found on his person. That unnecessary dilemma provides a particularly strong ground for this Court to grant further review. See *United States* v. *Knights*, 534 U.S. 112, 116 (2001) (resolving conflict between Ninth Circuit and Supreme Court of California on Fourth Amendment question).

C. The Question Presented Is Recurring And Important

1. This Court's intervention to resolve the conflict of authority, and to provide courts and law-enforcement officers with clear guidance about officers' authority to search cell phones found on the person of arrestees, is warranted. Over the last decade, cell phones have become ubiquitous in the United States. Inexpensive, disposable phones that are difficult to trace are particularly common in drug-trafficking conspiracies. See National Drug Intelligence Center, U.S. Dep't of Justice, *Midwest High Intensity Drug Trafficking Area Drug Mar-*

ket Analysis 2009, at 10 (Mar. 2009). Even low-level drug dealers often use at least two cell phones—"one for arranging drug deals and another for personal use." App., *infra*, 58a n.6. For that reason, it is critically important for police to quickly search cell phones of those arrested for drug-trafficking offenses in order to confirm the arrestee's identity, locate contraband, identify confederates, and obtain communications and records related to trafficking activities. Time is of the essence when one member of a drug-trafficking or other conspiracy is arrested, because other members may flee or destroy evidence upon learning of his apprehension. See *Flores-Lopez*, 670 F.3d at 810.

The court of appeals' departure from the settled *Robinson* rule for cell phones will engender confusion among law-enforcement officers faced with the dual demands of using any lawful means to disrupt criminal enterprises and taking care not to jeopardize future prosecutions by conducting searches that may taint critical evidence. As Chief Judge Lynch warned, "the differing standards which the courts have developed provide confusing and often contradictory guidance to law enforcement." App., *infra*, 71a (statement on denial of rehearing). The decision below puts Massachusetts law-enforcement officers in an especially difficult position, "leaving the police in need of further guidance." *Ibid.*

2. Because "cell phones sit at the intersection of several different Fourth Amendment doctrines," any particular search of a cell phone incident to arrest might be supported by multiple legal rationales. App., *infra*, 73a (Howard, J.) (statement on denial of rehearing). This Court's review of the decision below would provide it with the opportunity to address each of the legal theories justifying a cell-phone search: (1) a full search is

categorically permitted under *Robinson* and *Edwards* (pp. 11-15, *supra*); (2) even if the potential for destruction of evidence is required for a given category of items, cell phones present such a risk (pp. 15-16, *supra*); and (3) at a minimum, a search is permitted for evidence of the crime of arrest (pp. 17-19, *supra*) and identity-related evidence (p. 19, *supra*).

Thus, should this Court conclude that cell-phone searches are not categorically lawful under *Robinson* and *Edwards*, it will be able to resolve whether a particular search is permissible where "it is reasonable to believe that evidence of the offense of arrest might be found" on the phone, *Gant*, 556 U.S. at 335, or where the search is reasonably targeted to information likely to shed light on an arrestee's identity, *King*, 133 S. Ct. at 1971. The record in this case would permit the Court to address those alternative justifications for the search should it reach that question. See Gov't C.A. Br. 40-41; Gov't Pet. for Reh'g 11-12.[4] Particularly given the importance of clarity in this area of the law for everyday law-enforcement activities, this Court should have the

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[4] The petition in *Riley* v. *California*, No. 13-132 (filed July 30, 2013), presents the question "[w]hether or under what circumstances the Fourth Amendment permits police officers to conduct a warrantless search of the digital contents of an individual's cell phone seized from the person at the time of arrest." *Riley* Pet. at i. Unlike in *Riley*, however, the record in this case squarely raises the alternative *Gant*-related argument that the evidence sought on the phone was relevant to the crime of arrest, because the district court expressly found, in a published opinion, that "[t]he officers, having seen the 'my house' notation on [respondent's] caller identification screen, reasonably believed that the stored phone number would lead them to the location of [respondent's] suspected drug stash" at his true home address. App., *infra*, 66a; see also Gov't C.A. Br. 40-41 (making *Gant* argument).

opportunity to consider the full range of legal arguments supporting cell-phone searches incident to arrest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 11-1792

UNITED STATES OF AMERICA, APPELLEE

v.

BRIMA WURIE, DEFENDANT, APPELLANT

Filed: May 17, 2013

OPINION

Before: HOWARD, STAHL, and LIPEZ, Circuit Judges.

STAHL, Circuit Judge.

This case requires us to decide whether the police, after seizing a cell phone from an individual's person as part of his lawful arrest, can search the phone's data without a warrant. We conclude that such a search exceeds the boundaries of the Fourth Amendment search-incident-to-arrest exception. Because the government has not argued that the search here was justified by exigent circumstances or any other exception to the warrant requirement, we reverse the denial of defendant-appellant Brima Wurie's motion to suppress, vacate his conviction, and remand his case to the district court.

I. Facts & Background

On the evening of September 5, 2007, Sergeant Detective Paul Murphy of the Boston Police Department (BPD) was performing routine surveillance in South Boston. He observed Brima Wurie, who was driving a Nissan Altima, stop in the parking lot of a Lil Peach convenience store, pick up a man later identified as Fred Wade, and engage in what Murphy believed was a drug sale in the car. Murphy and another BPD officer subsequently stopped Wade and found two plastic bags in his pocket, each containing 3.5 grams of crack cocaine. Wade admitted that he had bought the drugs from "B," the man driving the Altima. Wade also told the officers that "B" lived in South Boston and sold crack cocaine.

Murphy notified a third BPD officer, who was following the Altima. After Wurie parked the car, that officer arrested Wurie for distributing crack cocaine, read him *Miranda* warnings, and took him to the police station. When Wurie arrived at the station, two cell phones, a set of keys, and $1,275 in cash were taken from him.

Five to ten minutes after Wurie arrived at the station, but before he was booked, two other BPD officers noticed that one of Wurie's cell phones, a gray Verizon LG phone, was repeatedly receiving calls from a number identified as "my house" on the external caller ID screen on the front of the phone. The officers were able to see the caller ID screen, and the "my house" label, in plain view. After about five more minutes, the officers opened the phone to look at Wurie's call

log. Immediately upon opening the phone, the officers saw a photograph of a young black woman holding a baby, which was set as the phone's "wallpaper." The officers then pressed one button on the phone, which allowed them to access the phone's call log. The call log showed the incoming calls from "my house." The officers pressed one more button to determine the phone number associated with the "my house" caller ID reference.

One of the officers typed that phone number into an online white pages directory, which revealed that the address associated with the number was on Silver Street in South Boston, not far from where Wurie had parked his car just before he was arrested. The name associated with the address was Manny Cristal.

Sergeant Detective Murphy then gave Wurie a new set of *Miranda* warnings and asked him a series of questions. Wurie said, among other things, that he lived at an address on Speedwell Street in Dorchester and that he had only been "cruising around" in South Boston. He denied having stopped at the Lil Peach store, having given anyone a ride, and having sold crack cocaine.

Suspecting that Wurie was a drug dealer, that he was lying about his address, and that he might have drugs hidden at his house, Murphy took Wurie's keys and, with other officers, went to the Silver Street address associated with the "my house" number. One of the mailboxes at that address listed the names Wurie and Cristal. Through the first-floor apartment window, the officers saw a black woman who looked like

the woman whose picture appeared on Wurie's cell phone wallpaper. The officers entered the apartment to "freeze" it while they obtained a search warrant. Inside the apartment, they found a sleeping child who looked like the child in the picture on Wurie's phone. After obtaining the warrant, the officers seized from the apartment, among other things, 215 grams of crack cocaine, a firearm, ammunition, four bags of marijuana, drug paraphernalia, and $250 in cash.

Wurie was charged with possessing with intent to distribute and distributing cocaine base and with being a felon in possession of a firearm and ammunition. He filed a motion to suppress the evidence obtained as a result of the warrantless search of his cell phone; the parties agreed that the relevant facts were not in dispute and that an evidentiary hearing was unnecessary. The district court denied Wurie's motion to suppress, *United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009), and, after a four-day trial, the jury found Wurie guilty on all three counts. He was sentenced to 262 months in prison. This appeal followed.

II. Analysis

In considering the denial of a motion to suppress, we review the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Kearney*, 672 F.3d 81, 88-89 (1st Cir. 2012).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirma-

tion, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The amendment grew out of American colonial opposition to British search and seizure practices, most notably the use of writs of assistance, which gave customs officials broad latitude to search houses, shops, cellars, warehouses, and other places for smuggled goods. The Honorable M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave it Birth*, 85 N.Y.U. L. Rev. 905, 907-09 (2010); s*ee generally* William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* (2009).

James Otis, a lawyer who challenged the use of writs of assistance in a 1761 case, famously described the practice as "plac[ing] the liberty of every man in the hands of every petty officer" and sounded two main themes: the need to protect the privacy of the home (what he called the "fundamental . . . Privilege of House"), Michael, *supra*, at 908 (citations and internal quotation marks omitted), and "the inevitability of abuse when government officials have the sort of unlimited discretion sanctioned by the writ," *id.* at 909. The Supreme Court has described Otis's argument as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." *Boyd v. United States*, 116 U.S. 616, 625, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

Today, a warrantless search is *per se* unreasonable under the Fourth Amendment, unless one of "a few

specifically established and well-delineated exceptions" applies. *Arizona v. Gant*, 556 U.S. 332, 338, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)) (internal quotation marks omitted). One of those exceptions allows the police, when they make a lawful arrest, to search "the arrestee's person and the area within his immediate control." *Id.* at 339 (quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)) (internal quotation marks omitted). In recent years, courts have grappled with the question of whether the search-incident-to-arrest exception extends to data within an arrestee's cell phone.[1]

A. The legal landscape

The modern search-incident-to-arrest doctrine emerged from *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), in which the Supreme Court held that a warrantless search of the defendant's entire house was not justified by the fact that it occurred as part of his valid arrest. The Court found that the search-incident-to-arrest exception permits an arresting officer "to search for and seize any evidence on the arrestee's person in order to prevent its con-

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[1] On appeal, Wurie does not challenge the seizure of his phone, and he concedes that, under the plain view exception, *see United States v. Paneto*, 661 F.3d 709, 713-14 (1st Cir. 2011), the officers were entitled to take notice of any information that was visible to them on the outside of the phone and on its screen (including, in this case, the incoming calls from "my house").

cealment or destruction" and to search "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Id.* at 763. The justifications underlying the exception, as articulated in *Chimel*, were protecting officer safety and ensuring the preservation of evidence. *Id.*

Four years later, in *United States v. Robinson*, 414 U.S. 218 (1973), the Supreme Court examined how the search-incident-to-arrest exception applies to searches of the person. Robinson was arrested for driving with a revoked license, and in conducting a pat down, the arresting officer felt an object that he could not identify in Robinson's coat pocket. *Id.* at 220-23. He removed the object, which turned out to be a cigarette package, and then felt the package and determined that it contained something other than cigarettes. Upon opening the package, the officer found fourteen capsules of heroin. *Id.* at 223. The Court held that the warrantless search of the cigarette package was valid, explaining that the police have the authority to conduct "a full search of the person" incident to a lawful arrest. *Id.* at 235.

Robinson reiterated the principle, discussed in *Chimel*, that "[t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." *Id.* at 234. However, the Court also said the following:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

Id. at 235.

The following year, the Court decided *United States v. Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974). Edwards was arrested on suspicion of burglary and detained at a local jail. After his arrest, police realized that Edwards's clothing, which he was still wearing, might contain paint chips tying him to the burglary. The police seized the articles of clothing and examined them for paint fragments. *Id.* at 801-02. The Court upheld the search, concluding that once it became apparent that the items of clothing might contain destructible evidence of a crime, "the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered." *Id.* at 806.

The Court again addressed the search-incident-to-arrest exception in *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), *abrogated on other grounds by California v. Acevedo*, 500

U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991), this time emphasizing that not all warrantless searches undertaken in the context of a custodial arrest are constitutionally reasonable. In *Chadwick*, the defendants were arrested immediately after having loaded a footlocker into the trunk of a car. *Id.* at 3-4. The footlocker remained under the exclusive control of federal narcotics agents until they opened it, without a warrant and about an hour and a half after the defendants were arrested, and found marijuana in it. *Id.* at 4-5. The Court invalidated the search, concluding that the justifications for the search-incident-to-arrest exception—the need for the arresting officer "[t]o safeguard himself and others, and to prevent the loss of evidence"—were absent. *Id.* at 14. The search "was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody" and therefore could not "be viewed as incidental to the arrest or as justified by any other exigency." *Id.* at 15.

Finally, there is the Supreme Court's recent decision in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). *Gant* involved the search of an arrestee's vehicle, which is governed by a distinct set of rules, *see id.* at 343, but the Court began with a general summary of the search-incident-to-arrest doctrine. Once again, the Court reiterated the twin rationales underlying the exception, first articulated in *Chimel*: "protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Id.* at 339 (citing

Chimel, 395 U.S. at 763). Relying on those safety and evidentiary justifications, the Court found that a search of a vehicle incident to arrest is lawful "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 343.[2]

Courts have struggled to apply the Supreme Court's search-incident-to-arrest jurisprudence to the search of data on a cell phone seized from the person. The searches at issue in the cases that have arisen thus far have involved everything from simply obtaining a cell phone's number, *United States v. Flores-Lopez*, 670 F.3d 803, 804 (7th Cir. 2012), to looking through an arrestee's call records, *United States v. Finley*, 477 F.3d 250, 254 (5th Cir. 2007), text messages, *id.*, or photographs, *United States v. Quintana*, 594 F. Supp. 2d 1291, 1295-96 (M.D. Fl. 2009).

Though a majority of these courts have ultimately upheld warrantless cell phone data searches, they have used a variety of approaches. Some have concluded that, under *Robinson* and *Edwards*, a cell phone can be freely searched incident to a defendant's lawful arrest, with no justification beyond the fact of the arrest itself. *E.g.*, *People v. Diaz*, 51 Cal. 4th 84, 119

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[2] The Court also concluded, "[a]lthough it does not follow from *Chimel*," that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 556 U.S. at 343 (citation and internal quotation marks omitted).

Cal. Rptr. 3d 105, 244 P.3d 501 (Cal. 2011). Others have, to varying degrees, relied on the need to preserve evidence on a cell phone. *E.g.*, *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009); *Finley*, 477 F.3d at 260; *Commonwealth v. Phifer*, 463 Mass. 790, 979 N.E. 2d 210, 213-16 (Mass. 2012). The Seventh Circuit discussed the *Chimel* rationales more explicitly in *Flores-Lopez*, assuming that warrantless cell phone searches must be justified by a need to protect arresting officers or preserve destructible evidence, 670 F.3d at 806-07, and finding that evidence preservation concerns outweighed the invasion of privacy at issue in that case, because the search was minimally invasive, *id.* at 809.

A smaller number of courts have rejected warrantless cell phone searches, with similarly disparate reasoning. In *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007), for example, the court concluded that a cell phone should be viewed not as an item immediately associated with the person under *Robinson* and *Edwards* but as a possession within an arrestee's immediate control under *Chadwick*, which cannot be searched once the phone comes into the exclusive control of the police, absent exigent circumstances, *id.* In *State v. Smith*, 124 Ohio St. 3d 163, 920 N.E. 2d 949 (Ohio 2009), the Ohio Supreme Court distinguished cell phones from other "closed containers" that have been found searchable incident to an arrest and concluded that, because an individual has a high expectation of privacy in the contents of her cell phone, any search thereof must be conducted pursuant to a warrant, *id.* at 955. And

most recently, in *Smallwood v. State*, —So. 3d—, 2013 WL 1830961 (Fla. May 2, 2013), the Florida Supreme Court held that the police cannot routinely search the data within an arrestee's cell phone without a warrant, *id.* The court read *Gant* as prohibiting a search once an arrestee's cell phone has been removed from his person, which forecloses the ability to use the phone as a weapon or to destroy evidence contained therein. *Id.*

B. Our vantage point

We begin from the premise that, in the Fourth Amendment context, "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-14, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). The Supreme Court has therefore rejected "inherently subjective and highly fact specific" rules that require "ad hoc determinations on the part of officers in the field and reviewing courts" in favor of clear ones that will be "readily understood by police officers." *Thornton v. United States*, 541 U.S. 615, 623, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004); *see also New York v. Belton*, 453 U.S. 454, 458, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) ("A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by

the officer in the field." (citation and internal quotation marks omitted)). As a result, when it upheld the warrantless search of the cigarette pack in *Robinson*, "the Court hewed to a straightforward rule, easily applied, and predictably enforced." *Belton*, 453 U.S. at 459. Thus, we find it necessary to craft a bright-line rule that applies to all warrantless cell phone searches, rather than resolving this case based solely on the particular circumstances of the search at issue.[3]

The government seems to agree, urging us to find that a cell phone, like any other item carried on the person, can be thoroughly searched incident to a lawful arrest.[4] The government's reasoning goes roughly as

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[3] The dissent, advocating a case-by-case, fact-specific approach, relies on *Missouri v. McNeely*, —U.S.—, 133 S. Ct. 1552, —L. Ed. 2d— (2013), which rejected a *per se* rule for warrantless blood tests of drunk drivers. But *McNeely* involved the exigent circumstances exception to the warrant requirement, and courts must "evaluate each case of alleged exigency based 'on its own facts and circumstances.'" *Id.* at 1559 (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S. Ct. 153, 75 L. Ed. 374 (1931)). The Supreme Court explicitly distinguished the exigency exception, which "naturally calls for a case-specific inquiry," from the search-incident-to-arrest exception, which "appl[ies] categorically." *Id.* at 1559 n. 3.

[4] It is worth noting three things that the government is not arguing in this case. First, it does not challenge the district court's finding that what occurred here was a Fourth Amendment search. *See Wurie*, 612 F. Supp. 2d at 109 ("It seems indisputable that a person has a subjective expectation of privacy in the contents of his or her cell phone."). Second, the government does not suggest

follows: (1) Wurie's cell phone was an item immediately associated with his person, because he was carrying it on him at the time of his arrest (or at least he does not argue otherwise); (2) such items can be freely searched without any justification beyond the fact of the lawful arrest, *see Robinson*, 414 U.S. at 235; (3) the search can occur even after the defendant has been taken into custody and transported to the station house, *see Edwards*, 415 U.S. at 803;[5] and (4) there is no limit on the scope of the search, other than the Fourth Amendment's core reasonableness requirement, *see id.* at 808 n.9.[6]

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that Wurie's expectation of privacy was in any way reduced because his phone was apparently not password-protected. Third, it does not claim that this was an inventory search. *See Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983).

[5] It is not clear from the record how much time passed between *Wurie*'s arrest and the search of his cell phone at the station house. Nonetheless, because *Wurie* has not raised the argument, we need not decide whether the government is correct that, under *Edwards*, the search here was "incident to" *Wurie*'s arrest, despite the delay. *See* 415 U.S. at 803 ("[S]earches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention.").

[6] The government has also suggested a more limited way for us to resolve this case: by holding that this particular search was lawful under *United States v. Sheehan*, 583 F.2d 30 (1st Cir. 1978). But *Sheehan* was a seizure case, not a search case, and "[i]t is extremely important to distinguish a *search* of the person from a *seizure* of objects found in that search." 3 Wayne R. LaFave, *Search & Seizure* § 5.2(j), at 185 (5th ed. 2012). The defendant in *Sheehan* conceded that "the search of his wallet was legal"; he

This "literal reading of the *Robinson* decision," *Flores-Lopez*, 670 F.3d at 805, fails to account for the fact that the Supreme Court has determined that there are categories of searches undertaken following an arrest that are inherently unreasonable because they are never justified by one of the *Chimel* rationales: protecting arresting officers or preserving destructible evidence. *E.g.*, *Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485; *Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538. As we explain below, this case therefore turns on whether the government can demonstrate that warrantless cell phone searches, as a category, fall within the boundaries laid out in *Chimel*.

The government admitted at oral argument that its interpretation of the search-incident-to-arrest exception would give law enforcement broad latitude to search any electronic device seized from a person during his lawful arrest, including a laptop computer or a tablet device such as an iPad. The search could encompass things like text messages, *e.g.*, *Finley*, 477

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challenged only the seizure of a list of names and telephone numbers in the wallet. 583 F.2d at 31. Because the list was not "a fruit, instrumentality, or contraband, probative of a crime," but rather "mere evidence," we analyzed whether probable cause existed to support the seizure. *Id.* (citing *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967)). The lawfulness of a search of the person incident to arrest, however, does not turn on the likelihood that evidence of the crime of arrest will be discovered. *See Robinson*, 414 U.S. at 234. The Supreme Court did articulate such a rule in *Gant* but limited it to the vehicle context. 556 U.S. at 343.

F.3d at 254, emails, *e.g.*, *People v. Nottoli*, 199 Cal. App. 4th 531, 130 Cal. Rptr. 3d 884, 894 (Cal. Ct. App. 2011), or photographs, *e.g.*, *Quintana*, 594 F. Supp. 2d at 1295-96, though the officers here only searched Wurie's call log. *Robinson* and *Edwards*, the government claims, compel such a finding.

We suspect that the eighty-five percent of Americans who own cell phones and "use the devices to do much more than make phone calls," Maeve Duggan & Lee Rainie, *Cell Phone Activities 2012*, Pew Internet & American Life Project, 2 (Nov. 25, 2012), http://pewinternet.org/~/media//Files/Reports/2012/PIP_CellActivities_11.25.pdf, would have some difficulty with the government's view that "Wurie's cell phone was indistinguishable from other kinds of personal possessions, like a cigarette package, wallet, pager, or address book, that fall within the search incident to arrest exception to the Fourth Amendment's warrant requirement."[7] In reality, "a modern cell phone is a computer," and "a computer . . . is not just another purse or address book." *Flores-Lopez*, 670 F.3d at 805. The storage capacity of today's cell phones is immense. Apple's iPhone 5 comes with up

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[7] *See, e.g.*, *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (pager); *United States v. Uricoechea-Casallas*, 946 F.2d 162, 166 (1st Cir. 1991) (wallet); *United States v. Holzman*, 871 F.2d 1496, 1504-05 (9th Cir. 1989) (address book), *overruled on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *United States v. Burnette*, 698 F.2d 1038, 1049 (9th Cir. 1983) (purse); *United States v. Eatherton*, 519 F.2d 603, 610-11 (1st Cir. 1975) (briefcase).

to sixty-four gigabytes of storage, *see* Apple, iPhone, Tech Specs, http://www.apple.com/iphone/specs.html (last visited May 16, 2013), which is enough to hold about "four million pages of Microsoft Word documents," Charles E. MacLean, *But, Your Honor, a Cell Phone is Not a Cigarette Pack: An Immodest Call for a Return to the Chimel Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 Fed. Cts. L. Rev. 37, 42 (2012).[8]

That information is, by and large, of a highly personal nature: photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records. *See United States v. Cotterman*, 709 F.3d 952, 957 (9th Cir. 2013) (en banc) ("The papers we create and maintain not only in physical but also in digital form reflect our

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[8] We are also cognizant of the fact that "[m]obile devices increasingly store personal user data in the cloud instead of on the device itself," which "allows the data to be accessed from multiple devices and provides backups." James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 Harv. J.L. & Tech. 241, 268 (2012). Though the government insisted at oral argument that it was not seeking a rule that would permit access to information stored in the cloud, we believe that it may soon be impossible for an officer to avoid accessing such information during the search of a cell phone or other electronic device, which could have additional privacy implications. *See United States v. Cotterman*, 709 F.3d 952, 965 (9th Cir. 2013) (en banc) ("With the ubiquity of cloud computing, the government's reach into private data becomes even more problematic.").

most private thoughts and activities.").[9] It is the kind of information one would previously have stored in one's home and that would have been off-limits to officers performing a search incident to arrest. *See Chimel*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685. Indeed, modern cell phones provide direct access to the home in a more literal way as well; iPhones can now connect their owners directly to a home computer's webcam, via an application called iCam, so that users can monitor the inside of their homes remotely. *Flores-Lopez*, 670 F.3d at 806. "At the touch of a button a cell phone search becomes a house search, and that is not a search of a 'container' in any normal sense of that word, though a house contains data." *Id.*

In short, individuals today store much more personal information on their cell phones than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers that the government has invoked. *See id.* at 805 (rejecting the idea that a cell phone can be compared to other items carried on the person, because today's cell phones are "quite likely to contain, or provide ready access to, a vast body of personal data").[10] Just as customs officers in the

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[9] For cases demonstrating the potential for abuse of private information contained in a modern cell phone, see, for example, *Schlossberg v. Solesbee*, 844 F. Supp. 2d 1165 (D. Or. 2012), and *Newhard v. Borders*, 649 F. Supp. 2d 440 (W.D. Va. 2009).

[10] The record here does not reveal the storage capacity of Wurie's cell phone, but that is of no significance, for two reasons. First, "[e]ven the dumbest of modern cell phones gives the user access to large stores of information." *Flores-Lopez*, 670 F.3d at

early colonies could use writs of assistance to rummage through homes and warehouses, without any showing of probable cause linked to a particular place or item sought, the government's proposed rule would give law enforcement automatic access to "a virtual warehouse" of an individual's "most intimate communications and photographs without probable cause" if the individual is subject to a custodial arrest, even for something as minor as a traffic violation. Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 183, 211 (2010). We are reminded of James Otis's concerns about "plac[ing] the liberty of every man in the hands of every petty officer." Michael, *supra*, at 908 (citation and internal quotation marks omitted).

It is true that *Robinson* speaks broadly, and that the Supreme Court has never found the constitutionality of a search of the person incident to arrest to turn on the kind of item seized or its capacity to store private information. In our view, however, what distinguishes a warrantless search of the data within a modern cell phone from the inspection of an arrestee's cigarette pack or the examination of his clothing is not

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806. Second, neither party has suggested that our holding today should turn on the specific features of Wurie's cell phone, and we find such a rule unworkable in any event. *See Thornton*, 541 U.S. at 623; *Murphy*, 552 F.3d at 411 ("[T]o require police officers to ascertain the storage capacity of a cell phone before conducting a search would simply be an unworkable and unreasonable rule.").

just the nature of the item searched, but the nature and scope of the *search itself*.

In *Gant*, the Court emphasized the need for "the scope of a search incident to arrest" to be "commensurate with its purposes," which include "protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." 556 U.S. at 339; *see also Chimel*, 395 U.S. at 762-63 ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might Seek to use . . . [and] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."). Inspecting the contents of a cigarette pack can (and, in *Robinson*, did) preserve destructible evidence (heroin capsules). It is also at least theoretically necessary to protect the arresting officer, who does not know what he will find inside the cigarette pack. Examining the clothing an arrestee is wearing can (and, in *Edwards*, did) preserve destructible evidence (paint chips). Thus, the searches at issue in *Robinson* and *Edwards* were the kinds of reasonable, self-limiting searches that do not offend the Fourth Amendment, even when conducted without a warrant. The same can be said of searches of wallets, address books, purses, and briefcases, which are all potential repositories for destructible evidence and, in some cases, weapons.

When faced, however, with categories of searches that cannot ever be justified under *Chimel*, the Supreme Court has taken a different approach. In

Chadwick, the Court struck down warrantless searches of "luggage or other personal property not immediately associated with the person of the arrestee" that the police have "reduced . . . to their exclusive control," because such searches are not necessary to preserve destructible evidence or protect officer safety. 433 U.S. at 15. Similarly, in *Gant*, the Court concluded that searching the passenger compartment of a vehicle once the arrestee has been secured and confined to a police car neither preserves destructible evidence nor protects officer safety. 556 U.S. at 335; *See also id.* at 339 ("If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply."). The searches at issue in *Chadwick* and *Gant* were general, evidence-gathering searches, not easily subject to any limiting principle, and the Fourth Amendment permits such searches only pursuant to a lawful warrant. *See Thornton*, 541 U.S. at 632 (Scalia, J., concurring) ("When officer safety or imminent evidence concealment or destruction is at issue, officers should not have to make fine judgments in the heat of the moment. But in the context of a general evidence-gathering search, the state interests that might justify any overbreadth are far less compelling.").

We therefore find it necessary to ask whether the warrantless search of data within a cell phone can ever be justified under *Chimel*. *See Flores-Lopez*, 670 F.3d at 806-10 (considering whether either of the *Chimel* rationales applies to cell phone data searches);

cf. United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (upholding the warrantless search of a pager incident to arrest because of the risk of destruction of evidence). The government has provided little guidance on that question. Instead, it has hewed to a formalistic interpretation of the case law, forgetting that the search-incident-to-arrest doctrine does not describe an independent right held by law enforcement officers, but rather a class of searches that are only reasonable in the Fourth Amendment sense because they are potentially necessary to preserve destructible evidence or protect police officers. Indeed, the government has included just one, notably tentative footnote in its brief attempting to place warrantless cell phone data searches within the *Chimel* boundaries. We find ourselves unconvinced.

The government does not argue that cell phone data searches are justified by a need to protect arresting officers. Wurie concedes that arresting officers can inspect a cell phone to ensure that it is not actually a weapon, *see Flores-Lopez*, 670 F.3d at 806 ("One can buy a stun gun that looks like a cell phone."), but we have no reason to believe that officer safety would require a further intrusion into the phone's contents. As we mentioned earlier, the officer who conducted the search in *Robinson* had no idea what he might find in the cigarette pack, which therefore posed a safety risk. The officers who searched Wurie's phone, on the other hand, knew exactly what they would find therein: data. They also knew that the data could not harm them.

The government has, however, suggested that the search here was "arguably" necessary to prevent the destruction of evidence. Specifically, the government points to the possibility that the calls on Wurie's call log could have been overwritten or the contents of his phone remotely wiped if the officers had waited to obtain a warrant.[11] The problem with the government's argument is that it does not seem to be particularly difficult to prevent overwriting of calls or remote wiping of information on a cell phone today. Arresting officers have at least three options. First, in some instances, they can simply turn the phone off or remove its battery. *See Flores-Lopez*, 670 F.3d at 808; *Diaz*, 119 Cal. Rptr. 3d 105, 244 P.3d at 515 n.24 (Werdegar, J., dissenting). Second, they can put the

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[11] The government and our dissenting colleague have also suggested that Wurie's failure to answer calls or to return home after the drug deal might have alerted others to the fact of his arrest and caused *them* to destroy or conceal evidence (presumably the drug stash later discovered at his home). That is mere speculation, and it is also a possibility present in almost every instance of a custodial arrest; we do not think that such concerns should always justify the search of a cell phone or other electronic device. Furthermore, the risk of destruction, as we understand it, attaches to the evidence that the arrestee is actually carrying on his person—not to evidence being held or guarded elsewhere by a co-conspirator. *See Gant*, 556 U.S. at 339 (describing the need to safeguard "any evidence of the offense of arrest that an arrestee might conceal or destroy" (emphasis added)); *Chimel*, 395 U.S. at 763 ("In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." (emphasis added)).

phone in a Faraday enclosure, a relatively inexpensive device "formed by conducting material that shields the interior from external electromagnetic radiation." MacLean, *supra*, at 50 (citation and internal quotation marks omitted); *see also Flores-Lopez*, 670 F.3d at 809. Third, they may be able "to 'mirror' (copy) the entire cell phone contents, to preserve them should the phone be remotely wiped, without looking at the copy unless the original disappears." *Flores-Lopez*, 670 F.3d at 809.

Indeed, if there is a genuine threat of remote wiping or overwriting, we find it difficult to understand why the police do not routinely use these evidence preservation methods, rather than risking the loss of the evidence during the time it takes them to search through the phone. Perhaps the answer is in the government's acknowledgment that the possibility of remote wiping here was "remote" indeed. Weighed against the significant privacy implications inherent in cell phone data searches, we view such a slight and truly theoretical risk of evidence destruction as insufficient. While the measures described above may be less convenient for arresting officers than conducting a full search of a cell phone's data incident to arrest, the government has not suggested that they are unworkable, and it bears the burden of justifying its failure to obtain a warrant. *See United States v. Jeffers*, 342 U.S. 48, 51, 72 S. Ct. 93, 96 L. Ed. 59 (1951). "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

Instead of truly attempting to fit this case within the *Chimel* framework, the government insists that we should disregard the *Chimel* rationales entirely, for two reasons.

First, the government emphasizes that *Robinson* rejected the idea that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." 414 U.S. at 235. That holding was predicated on an assumption, clarified in *Chadwick*, that "[t]he potential dangers lurking in all custodial arrests" are what "make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved." 433 U.S. at 14-15. For the reasons we just discussed, that assumption appears to be incorrect in the case of cell phone data searches. More importantly, however, we are not suggesting a rule that would require arresting officers or reviewing courts to decide, on a case-by-case basis, whether a particular cell phone data search is justified under *Chimel*. Rather, we believe that warrantless cell phone data searches are *categorically* unlawful under the search-incident-to-arrest exception, given the government's failure to demonstrate that they are ever necessary to promote officer safety or prevent the destruction of evidence. We read *Robinson* as compatible with such a finding.

Second, the government places great weight on a footnote at the end of *Chadwick* stating that searches

of the person, unlike "searches of possessions within an arrestee's immediate control," are "justified by . . . reduced expectations of privacy caused by the arrest." 433 U.S. at 16 n.10. The government reads that footnote as establishing an unlimited principle that searches of items carried on the person require no justification whatsoever beyond a lawful arrest, making *Chimel* irrelevant in this context. The *Chadwick* footnote is surely meant to reference similar language in *Robinson* explaining that, because the "custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment[,] . . . a search incident to the arrest requires no additional justification." 414 U.S. at 235.

Yet the Court clearly stated in *Robinson* that "[t]he authority to search the person incident to a lawful custodial arrest" is "based upon the need to disarm and to discover evidence," *id.*, and *Chadwick* did not alter that rule. When the Court decided *Robinson* in 1973 and *Chadwick* in 1977, any search of the person would almost certainly have been the type of self-limiting search that could be justified under *Chimel*. The Court, more than thirty-five years ago, could not have envisioned a world in which the vast majority of arrestees would be carrying on their person an item containing not physical evidence but a vast store of intangible data—data that is not immediately destructible and poses no threat to the arresting officers.

In the end, we therefore part ways with the Seventh Circuit, which also applied the *Chimel* rationales in *Flores-Lopez*. Though the court described the risk of

evidence destruction as arguably "so slight as to be outweighed by the invasion of privacy from the search," it found that risk to be sufficient, given the minimal nature of the intrusion at issue (the officers had only searched the cell phone for its number). *Flores-Lopez*, 670 F.3d at 809. That conclusion was based, at least in part, on Seventh Circuit precedent allowing a "minimally invasive" warrantless search. *Id.* at 807 (citing *United States v. Concepcion*, 942 F.2d 1170 (7th Cir. 1991)).

We are faced with different precedent and different facts, but we also see little room for a case-specific holding, given the Supreme Court's insistence on bright-line rules in the Fourth Amendment context. *See, e.g.*, *Thornton*, 541 U.S. at 623. A series of opinions allowing some cell phone data searches but not others, based on the nature and reasonableness of the intrusion, would create exactly the "inherently subjective and highly fact specific" set of rules that the Court has warned against and would be extremely difficult for officers in the field to apply. *Id.* Thus, while the search of Wurie's call log was less invasive than a search of text messages, emails, or photographs, it is necessary for all warrantless cell phone data searches to be governed by the same rule. A rule based on particular instances in which the police do not take full advantage of the unlimited potential presented by cell phone data searches would prove impotent in those cases in which they choose to exploit that potential.

We therefore hold that the search-incident-to-arrest exception does not authorize the warrantless

search of data on a cell phone seized from an arrestee's person, because the government has not convinced us that such a search is ever necessary to protect arresting officers or preserve destructible evidence. *See Chimel*, 395 U.S. at 763. Instead, warrantless cell phone data searches strike us as a convenient way for the police to obtain information related to a defendant's crime of arrest—or other, as yet undiscovered crimes—without having to secure a warrant. We find nothing in the Supreme Court's search-incident-to-arrest jurisprudence that sanctions such a "general evidence-gathering search." *Thornton*, 541 U.S. at 632 (Scalia, J., concurring).[12]

There are, however, other exceptions to the warrant requirement that the government has not invoked here but that might justify a warrantless search of cell phone data under the right conditions. Most importantly, we assume that the exigent circumstances exception would allow the police to conduct an immediate, warrantless search of a cell phone's data where they have probable cause to believe that the phone contains evidence of a crime, as well as a compelling need to act quickly that makes it impracticable for them to obtain a warrant—for example, where the phone is believed to contain evidence necessary to locate a kidnapped child or to investigate a bombing

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[12] We acknowledge that we may have to revisit this issue in the years to come, if further changes in technology cause warrantless cell phone data searches to become necessary under one or both of the *Chimel* rationales.

plot or incident. *See United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995) (discussing the exigent circumstances exception).

C. The good-faith exception

That leaves only the government's belated argument, made for the first time in a footnote in its brief on appeal, that suppression is inappropriate here under the good-faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897 (1984). The government bears the "heavy burden" of proving that the good-faith exception applies, *United States v. Syphers*, 426 F.3d 461, 468 (1st Cir. 2005), and it did not invoke the exception before the district court.

This is not a case in which an intervening change in the law made the good-faith exception relevant only after the district court issued its opinion. *E.g.*, *Davis v. United States*, —U.S.—, — - —, 131 S. Ct. 2419, 2425-26, 180 L. Ed. 2d 285 (2011); *United States v. Sparks*, 711 F.3d 58, 61-62 (1st Cir. 2013); *United States v. Lopez*, 453 F. App'x 602, 605 (6th Cir. 2011); *See also United States v. Curtis*, 635 F.3d 704, 713-14 (5th Cir. 2011) (applying the good-faith exception "to a search that was legal at the time it was conducted but has been rendered illegal by an intervening change in the law"); *United States v. McCane*, 573 F.3d 1037, 1044 (10th Cir. 2009) (finding that "a police officer who undertakes a search in reasonable reliance upon the settled case law of a United States Court of Appeals, even though the search is later deemed invalid by Supreme Court decision, has not engaged in misconduct"). The government emphasizes that we may

affirm the district court's suppression ruling on any ground made manifest by the record. *United States v. Doe*, 61 F.3d 107, 111-12 (1st Cir. 1995). In this case, however, we do not believe that ground should be one with respect to which the government bore the burden of proof and entirely failed to carry that burden below, despite the fact that the issue was ripe for the district court's review.[13]

III. Conclusion

Since the time of its framing, "the central concern underlying the Fourth Amendment" has been ensuring that law enforcement officials do not have "unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345; *see also Chimel*, 395 U.S. at 767-68. Today, many Americans store their most personal "papers" and "effects," U.S. Const. amend. IV, in electronic format on a cell phone, carried on the person. Allowing the police to search that data without a warrant any time they conduct a lawful arrest would, in our view, create "a serious and recurring threat to the privacy of countless individuals." *Gant*, 556 U.S. at 345; cf. *United States v. Jones*, —U.S.—, —, 132 S. Ct. 945, 950, 181 L. Ed. 2d 911 (2012) ("At bottom, we must 'assur[e] preservation of that degree

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[13] The government invokes *United States v. Grupee*, 682 F.3d 143, 148 (1st Cir. 2012), in which we addressed the good-faith exception despite the fact that the district court had not done so in its opinion. However, the record in that case reveals that the government had raised the good-faith exception below; the district court simply did not reach it.

of privacy against government that existed when the Fourth Amendment was adopted.'" (quoting *Kyllo v. United States*, 533 U.S. 27, 34, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001))).

We therefore *reverse* the denial of Wurie's motion to suppress, *vacate* his conviction, and *remand* for further proceedings consistent with this opinion.

HOWARD, Circuit Judge, dissenting.

Undoubtedly, most of us would prefer that the information stored in our cell phones be kept from prying eyes, should a phone be lost or taken from our hands by the police during an arrest. One could, individually, take protective steps to enhance the phone's security settings with respect to that information, or for that matter legislation might be enacted to make such unprotected information off-limits to finders or to the police unless they first obtain a warrant to search the phone. But the question here is whether the Fourth Amendment requires this court to abandon long-standing precedent and place such unprotected information contained in cell phones beyond the reach of the police when making a custodial arrest. I think that we are neither required nor authorized to rule as the majority has.

Instead, this case requires us to apply a familiar legal standard to a new form of technology. This is an exercise we must often undertake as judges, for the Constitution is as durable as technology is disruptive. In this exercise, consistency is a virtue. Admittedly, when forced to confront the boundaries not only of the Fourth Amendment, but also of the technology in

question, it is not surprising that we would look beyond the case at hand and theorize about the long-term effects of our decision. Yet the implications of our decisions, while important, are ancillary to our constitutionally defined power to resolve each case as it appears before us. Having scrutinized the relevant Supreme Court decisions, as well as our own precedent, I find no support for Wurie's claim that he had a constitutional right protecting the information obtained during the warrantless search. Nor do I believe that we possess the authority to create such a right. Therefore, I respectfully dissent.

The facts are clear: the police conducted a valid custodial arrest of Wurie; the cell phone was on Wurie's person at the time of the arrest; after seeing repeated calls to Wurie's cell phone from "my house," the police flipped it open and, pressing two buttons, retrieved the associated number.

We have long acknowledged that police officers can extract this type of information from containers immediately associated with a person at the time of arrest. In *United States v. Sheehan*, 583 F.2d 30 (1st Cir. 1978), police arrested a suspected bank robber and then searched his wallet, which included a piece of paper bearing several names and telephone numbers. *Id.* at 30-31. The police officers copied this piece of paper, which action *Sheehan* challenged as an unconstitutional seizure. The claim is made that *Sheehan* is inapposite to the present case because it concerned a challenge to the seizure, not the search. We, however, did not address the warrantless search in *Sheehan*

because its legality was beyond dispute. Judge Coffin, for the court, noted as an initial matter that "[a]ppellant concedes, as he must, that his arrest was lawful and that therefore the search of his wallet was legal." *Id.* (emphasis added). It is not as though *Sheehan* left the legality of the search unresolved; rather, the court considered the issue uncontroversial, and therefore provided no elaboration. *See also United States v. Uricoechea-Casallas*, 946 F.2d 162, 165-66 (1st Cir. 1991) (upholding the warrantless search of a wallet incident to a custodial arrest).

Sheehan was no outlier. Courts have regularly upheld warrantless searches of nearly identical information in a range of "containers." *E.g., United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (telephone numbers from a pager); *United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993) (address book kept inside a wallet); *United States v. Molinaro*, 877 F.2d 1341, 1346-47 (7th Cir. 1989) (phone numbers on slips of paper found in a wallet); *United States v. Holzman*, 871 F.2d 1496, 1504-05 (9th Cir. 1989) (address book), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).

The police officers' limited search of one telephone number in Wurie's call log was even less intrusive than the searches in these cases. The police observed, in plain view, multiple calls from "my house"—a shorthand similar to what millions of cell phone owners use to quickly identify calls instead of the number assigned by the service provider—to Wurie's cell phone. Only then did they initiate their search and only for the lim-

ited purpose of retrieving the actual phone number associated with "my house." The police did not rummage through Wurie's cell phone, unsure of what they could find. Before they had even begun their search, they knew who was calling Wurie and how many times the person had called. The additional step of identifying the actual telephone number hardly constituted a further intrusion on Wurie's privacy interests, especially since that information is immediately known to the third-party telephone company. *See United States v. Flores-Lopez*, 670 F.3d 803, 807 (7th Cir. 2012) (holding that the police could retrieve an arrestee's cell phone number from his phone without a warrant, in part, because "the phone company knows a phone's number as soon as the call is connected to the telephone network; and obtaining that information from the phone company isn't a search because by subscribing to the telephone service the user of the phone is deemed to surrender any privacy interest he may have had in his phone number") (citing *Smith v. Maryland*, 442 U.S. 735, 742-43, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)); *see also* Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 183, 210 (suggesting a rule that permits the warrantless search of "call lists and text message addressees" pursuant to an arrest). This case fits easily within existing precedent.

Nor are there any other persuasive grounds for distinguishing this case from our previous decisions. That the container the police searched was a cell phone is not, by itself, dispositive, for "a constitutional dis-

tinction between 'worthy' and 'unworthy' containers would be improper." *United States v. Ross*, 456 U.S. 798, 822, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). We made a similar observation in *United States v. Eatherton*, 519 F.2d 603 (1st Cir. 1975), where we upheld the warrantless search of a briefcase incident to an arrest. *Id.* at 610-11. We recognized that a briefcase had some unique characteristics, but explicitly rejected any analysis turning on the nature of the searched container: "While a briefcase may be a different order of container from a cigarette box, it is not easy to rest a principled articulation of the reach of the fourth amendment upon the distinction. . . . [W]hile [such a distinction] may have analytical appeal, it does not presently represent the law." *Id.* at 610 (citations omitted).

Even assuming that cell phones possess unique attributes that we must consider as part of our analysis, none of those attributes are present in this case. Though we do not know the storage capacity of Wurie's cell phone, we know that the police did not browse through voluminous data in search of general evidence. Nor did they search the "cloud,"[14] or other applications containing particularly sensitive information. Instead, they conducted a focused and limited

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[14] The government does not claim a right to conduct warrantless searches of information in the cloud. This is an important concession, for it suggests that the government accepts that there are limits to searches of items found on custodial arrestees. I discuss my view of those limits later.

search of Wurie's electronic call log. If the information that they sought had been written on a piece of paper, as opposed to stored electronically, there would be no question that the police acted constitutionally, so I see no reason to hold otherwise in this case. The constitutionality of a search cannot turn solely on whether the information is written in ink or displayed electronically.

The issue of warrantless cell phone searches has come before a number of circuits. *E.g.*, *Flores-Lopez*, 670 F.3d at 803-10; *United States v. Curtis*, 635 F.3d 704, 712 (5th Cir. 2011); *Silvan W. v. Briggs*, 309 F. App'x 216, 225 (10th Cir. 2009) (unpublished); *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009). None of them have adopted the majority's categorical bar on warrantless cell phone searches. Instead, they unanimously have concluded that the cell phone searches before them did not violate the Fourth Amendment.

I reach the same conclusion here. Wurie's cell phone was on his person at the time of the arrest. The information that the police looked at was of a character that we have previously held searchable during a custodial arrest. Wurie has made no convincing argument for why this search is any different than the search for phone numbers kept in a wallet or an address book. Thus, I see no reason to look for complications where none exist; Wurie has not shown a violation of his Fourth Amendment rights.

In my view, there is another rationale, apparent from the record, for upholding this search: the risk

that others might have destroyed evidence after Wurie did not answer his phone. Wurie received repeated calls from "my house" in the span of a few minutes after his arrest. His failure to answer these phone calls could have alerted Wurie's confederates to his arrest, prompting them to destroy further evidence of his crimes. The majority asserts that this scenario would be present "in almost every instance of a custodial arrest," giving police an ever-ready justification to search cell phones. *Supra* at 23 n.11. On the contrary, the justification is based on the specific facts of this case. The fact that "my house" repeatedly called Wurie's cell phone provided an objective basis for enhanced concern that evidence might be destroyed and thus gave the police a valid reason to inspect the phone. *See United States v. Chimel*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

This additional reason for affirmance is not a novel one. *United States v. Gomez*, 807 F. Supp. 2d 1134 (S.D. Fla. 2011), presents a comparable example. In that case, police officers, after observing multiple phone calls from the same number to an arrested drug dealer's cell phone, first answered the ringing cell phone and thereafter communicated to the caller via text message while posing as the arrestee, which led to the discovery of additional evidence. *Id.* at 1139. The district court denied a motion to suppress this evidence, holding the police acted according to "the exigencies commensurate with the Defendant's ringing cell phone." *Id.* at 1152; *see also United States v. De La Paz*, 43 F. Supp. 2d 370, 375-76 (S.D. N.Y. 1999) (admitting evidence—under the exigent circumstances

exception—obtained when the police answered an arrestee's cell phone and heard multiple callers identify the arrestee by his drug dealer moniker). The police action in this case is analogous—arguably less invasive—and a further reason why Wurie's constitutional challenge founders on the specific facts of this case.

Granted, my fact-specific view does not comport with the all-or-nothing approach adopted by the majority and some state courts, *see Smallwood v. State*, No. SC11-1130, 2013 WL 1830961 (Fla. May 2, 2013); *State v. Smith*, 124 Ohio St.3d 163, 920 N.E. 2d 949 (Ohio 2009). But I find the competing rationale unpersuasive.[15] Most pointedly, for the reasons explained above, Wurie himself suffered no constitutional violation during the search. If we are to fashion a rule, it cannot elide the facts before us. "The constitutional validity of a warrantless search is preeminently the sort of question which can only be de-

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[15] The insistence on a bright-line rule contrasts with the recent Supreme Court opinion in *Missouri v. McNeely*, —U.S.—, 133 S. Ct. 1552, —L. Ed. 2d— (2013), which rejected a bright line rule and instead relied on a totality of the circumstances analysis for warrantless blood tests of drunk drivers, *id.* at 1564 ("[A] case-by-case approach is hardly unique within our Fourth Amendment jurisprudence. Numerous police actions are judged based on fact intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are [ ] likely to require police officers to make difficult split-second judgments."). While it can be argued that a bright-line rule is preferable, it cannot be claimed that such a rule is necessary.

cided in the concrete factual context of the individual case." *Sibron v. New York*, 392 U.S. 40, 59 (1968). Yet the competing analysis focuses on hypothetical searches that have not emerged in any case or controversy before this court. Those scenarios may one day form the basis of our reasoning in another case, but they cannot govern our analysis of Wurie's claim.

The majority gets around this problem by requiring the government to "demonstrate that warrantless cell phone searches, as a category, fall within the boundaries laid out in *Chimel*." *Supra* at 16. It cites *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991), and *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), to support this approach. The Supreme Court did hold on those two occasions, neither of which involved the search of items held by the arrestee, that certain types of searches require a warrant because they lack any *Chimel* justification. But the Supreme Court has not extrapolated from those cases a general rule that the government justify each category of searches under *Chimel*, nor a requirement that the appellate courts conduct this sort of analysis.

Indeed, if the Supreme Court wishes us to look at searches incident to arrest on a categorical basis, it is curious that the Court has offered absolutely no framework for defining what constitutes a distinct category. Each arrest has its own nuances and variations, from the item searched (as in this case) to the

officer's control over it (as was the case in *Chadwick*), and there could be infinite distinct categories of searches based on these variations. Yet no relevant criteria are articulated for establishing these categories. That is not a good way to impose this new paradigm, under which every arrestee is now invited to argue that his search falls into some distinct category and therefore must be justified under *Chimel.*

Thus, either we are drastically altering the holding in *United States v. Robinson*, 414 U.S. 218 (1973), by forcing the government to provide a *Chimel* rationale for practically every search, or we are putting ourselves in the position of deciding, without any conceptual basis, which searches are part of a distinct "category" and which are not. This runs the risk of spreading confusion in the law enforcement community and multiplying, rather than limiting, litigation pertaining to these searches.

It is argued that the categorical approach flows from the Supreme Court's opinion in *Gant*, which reaffirmed "the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Gant*, 556 U.S. at 343 (quoting *New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 n.3 (1981)). *Gant* did take a categorical, *Chimel*-based approach to the search in question, but its usefulness for our analysis should not be overstated.

As the government points out, the Supreme Court cases treat searches of the arrestee and the items on the arrestee—as is the case here—as either not sub-

ject to the *Chimel* analysis, or at a least subject to a lower level of *Chimel* scrutiny. These cases, unlike *Chimel* and *Gant*, are on point with Wurie's case, and we are not free to disregard them in favor of the principles enunciated in *Gant*. As an inferior court, we are cautioned against "conclud[ing] [that] more recent cases have, by implication, overruled an earlier precedent. . . . [I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (internal quotation marks and alterations omitted).

In *Robinson*, the Supreme Court drew a sharp distinction between two types of searches pursuant to an arrest: searches of the arrestee and searches of the area within his control. "The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged. . . . Throughout the series of cases in which the Court has addressed the second [type of search,] no doubt has been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee." *Robinson*, 414 U.S. at 224-25. The Supreme Court did state that the basis of this authority is "the need to disarm and to discover evidence," *id.* at 235, but in the next sentence clarified that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a

search incident to the arrest requires no additional justification," *id.*

Indeed, the Court could not rely on a *Chimel* justification in *Robinson*, as the arresting officer conceded that he "did not in fact believe that the object in [*Robinson*]'s coat pocket was a weapon" and that he gave no thought to the destruction of evidence either. *Id.* at 251 (Marshall, J., dissenting) (quoting the arresting officer's testimony: "I didn't think about what I was looking for. I just searched him."). *Robinson* may not have rejected *Chimel* in the context of searches of an arrestee and items on the arrestee, but it did establish that these searches differ from other types of searches incident to arrest.

The Supreme Court reiterated *Robinson*'s holding in *United States v. Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974), in which the Court upheld the search and seizure of an arrestee's clothing ten hours after he was arrested. While most of the analysis focused on the timing of the search, the opinion assumed that law enforcement could "tak[e] from [the arrestee] the effects in his immediate possession that constituted evidence of crime. This was and is a normal incident of a custodial arrest. . . . " *id.* at 805; *see also id.* at 803 ("[B]oth the person and the property in his immediate possession may be searched at the station house after the arrest has occurred. . . . "). Once again, the Supreme Court was unconcerned with the existence or nonexistence of *Chimel* rationales. The opinion barely discussed them, and the government did not seek to prove that they

were present. *Id.* at 811 n.3 (Stewart, J., dissenting) ("No claim is made that the police feared that *Edwards* either possessed a weapon or was planning to destroy the paint chips on his clothing. Indeed, the Government has not even suggested that he was aware of the presence of the paint chips on his clothing.").

Even in *Chadwick*, where the Supreme Court did require the police to obtain a warrant for a category of searches, it continued to treat the search of an arrestee and items immediately associated with him as independently justified by "reduced expectations of privacy caused by the arrest." *Chadwick*, 433 U.S. at 16 n.10. Thus, the holding in *Chadwick* applied only to "luggage or other personal property *not immediately associated with the person of the arrestee*." *Id.* at 15 (emphasis added). These cases, taken together, establish that items immediately associated with the arrestee—as a category—may be searched without any *Chimel* justification. The majority seeks a bright-line rule to govern cell phone searches, but denies the fact that such a rule—covering all items on the arrestee's person—already exists.

But even if searches of items on an arrestee required *Chimel* justifications, I cannot see why cell phones fail to meet this standard if wallets, cigarette packages, address books, briefcases, and purses do. The attempt is made to distinguish cell phones from these other items, but those distinctions do not hold up under scrutiny.

One argument is that these other items, unlike cell phones, all theoretically could contain "destructible"

evidence, which justifies examining them. But the evidence in a cell phone is just as destructible as the evidence in a wallet: with the press of a few buttons, accomplished even remotely, cell phones can wipe themselves clean of data. Any claim that the information is not destructible strikes me as simply wrong.[16] Perhaps what is meant is that the cell phone data is no longer destructible once it is within the exclusive control of law enforcement officers. But even accepting that the likelihood of destruction is reduced to almost zero once the officers are in control of a cell phone, this is equally true of cigarette packages, wallets, address books, and briefcases. Drugs do not disappear into thin air; weapons do not flee of their own accord. If that is the basis for the reasoning, then a warrant should be required before searching any object within the exclusive control of the police. I do not think that the majority is arguing for this rule, but I cannot see any other outcome under its analysis. Ironically, cell phones arguably pose a greater *Chimel* risk than most other items because, unlike cigarette packages or wallets, the evidence contained in cell phones remains

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[16] The term "destructible" evidence is perhaps intended to mean "physical" or "tangible" evidence. That distinction does not fly, for two reasons. First, just because evidence is intangible does not make it indestructible. As noted, an arrestee can delete data just as easily as he can discard drugs. Second, any distinction based on the difference between tangible and intangible evidence ignores the fact that we have upheld the warrantless search of intangible information during a custodial arrest. *United States v. Sheehan*, 583 F.2d 30, 31 (1st Cir. 1978).

destructible even after the police have assumed exclusive control of the phone via remote wiping.[17]

Another argument is that because cell phone searches are not "self-limiting," they always require a warrant. The majority does not precisely define the term "self-limiting," but I gather that it refers to the danger that cell phones, because of their vast storage capabilities, are susceptible to "general, evidence-gathering searches." *Supra* at 21 (citing *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring)). As an initial matter, this has never been the focus of Supreme Court cases discussing the search incident to arrest exception for items immediately associated with the arrestee.[18] Thus, I am reluctant to give it much weight in assessing Wurie's constitutional claim.

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[17] It is also half-heartedly suggested that containers that hold physical objects, unlike cell phones, pose a risk to officer safety. "[T]he officer who conducted the search in *Robinson* had no idea what he might find in the cigarette pack, which therefore posed a safety risk." *Supra* at 23. I find it hard to believe that a reasonable police officer is more justified in remaining on guard against booby-trapped cigarette packs and wallets in the line of duty, than she is against sophisticated electronic devices.

[18] For instance, in *Robinson*, the police conducted their search pursuant to a standard operating procedure of the police department, which trained officers to carry out a full field search after any arrest. *United States v. Robinson*, 414 U.S. 218, 221 n.2 (1973). That entailed "completely search[ing] the individual and inspect[ing] areas such as behind the collar, underneath the dollar [sic], the waistband of the trousers, the cuffs, the socks and shoes

Nonetheless, if we are concerned that police officers will exceed the limits of constitutional behavior while searching cell phones, then we should define those limits so that police can perform their job both effectively and constitutionally. Instead, the majority has lumped all cell phone searches together, even while perhaps acknowledging that its broad rule may prohibit some otherwise constitutional searches. *Supra* at 28 ("Thus, while the search of Wurie's call log was less invasive than a search of text messages, emails, or photographs, it is necessary for all warrantless cell phone data searches to be governed by the same rule."). But this need not be the solution. We can draw the appropriate line for cell phone searches, just as we have done in other contexts. For instance, a body search, like a cell phone search, is not inherently self-limiting. A frisk can lead to a strip search, which can lead to a cavity search, which can lead to x-ray scanning. But this parade of horribles has not come to pass because we have established the constitutional line, and conscientious law enforcement officers have largely adhered to it. *See Swain v. Spinney*, 117 F.3d 1, 5-9 (1st Cir. 1997) (holding that police officers may not conduct a strip search of an arrestee incident to the arrest); *see also Roberts v. Rhode Island*, 239 F.3d

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. . . [as well as] examin[ing] the contents of all the pockets' [*sic*] of the arrestee. . . . " *Id.* (internal quotation marks omitted). Given that *Robinson* was arrested for a traffic violation, and that the arresting officer conceded that he felt no personal risk during the arrest, the only conceivable purpose for this search was to gather general evidence.

107, 113 (1st Cir. 2001) (holding that indiscriminate strip searches of misdemeanant arrestees during administrative processing at a detention facility violated the Fourth Amendment). The majority has instead chosen to ignore this option in favor of a rule that sweeps too far.

Still, I share many of the majority's concerns about the privacy interests at stake in cell phone searches. While the warrantless search of Wurie's phone fits within one of our "specifically established and well-delineated exceptions," *United States v. Camacho*, 661 F.3d 718, 724 (1st Cir. 2011) (citations omitted) (internal quotation marks omitted), due to the rapid technological development of cell phones and their increasing prevalence in society, cell phone searches do pose a risk of depriving arrestees of their protection against unlawful searches and seizures. There must be an outer limit to their legality.

In *Flores-Lopez*, Judge Posner suggested that courts should balance the need to search a cell phone against the privacy interests at stake.

> [E]ven when the risk either to the police officers or to the existence of the evidence is negligible, the search is allowed, provided it's no more invasive than, say, a frisk, or the search of a conventional container, such as *Robinson*'s cigarette pack, in which heroin was found. If instead of a frisk it's a strip search, the risk to the officers' safety or to the preservation of evidence of crime must be greater to justify the search.

Flores-Lopez, 670 F.3d at 809 (citations omitted). I believe that cell phone searches should follow this formula. That is not to say that the police must prove a risk to officer safety or destruction of evidence in every case. There is, inherent in every custodial arrest, some minimal risk to officer safety and destruction of evidence. Moreover, *Chadwick* states that the arrest itself diminishes the arrestee's privacy rights over items "immediately associated" with the arrestee. *Chadwick*, 433 U.S. at 15. But the invasion of the arrestee's privacy should be proportional to the justification for the warrantless search.

This approach respects "the Fourth Amendment's general proscription against unreasonable searches and seizures." *Edwards*, 415 U.S. at 808 n.9 (citations omitted) (internal quotation marks omitted). It is also consistent with the core reasonable limit that has been acknowledged in *Robinson*, which does not permit "extreme or patently abusive" searches, *Robinson*, 414 U.S. at 236, and its offspring, *see, e.g.*, *Swain*, 117 F.3d at 5-9. The Supreme Court's recent opinion in *Missouri v. McNeely*, —U.S.—, 133 S. Ct. 1552, —L. Ed. 2d— (2013), shows that the reasonableness inquiry remains a touchstone of Fourth Amendment analysis. The Court held that, in the context of warrantless blood tests of drunk drivers, courts had to look to "the totality of the circumstances" to determine whether police officers' reliance on the exigency exception was reasonable. *Id.* at 1558-63.

Similarly, while *Robinson*'s principles generally authorize cell phone searches, and certainly encompass

the search in this case, there are reasonable limits to *Robinson* that we should not hesitate to enforce, especially in light of a cell phone's unique technological capabilities, for "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33-34, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

I find helpful the analysis in *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc). In that case, the Ninth Circuit determined whether a warrantless forensic examination of a laptop computer during a border search violated the Fourth Amendment. The court conducted a reasonableness analysis, balancing the privacy interests of the individual against the sovereign's interests in policing its borders. *Id.* at 960. It stated that, had the search only involved "turn[ing] on the devices and open[ing] and view[ing] image files . . . we would be inclined to conclude it was reasonable." *Id.* at 960-61. However, the invasive nature of the forensics examination, which included restoring previously deleted files, as well as "the uniquely sensitive nature of data on electronic devices," *id.* at 966, convinced the court that the forensics examination was an unreasonable border search absent a showing of reasonable suspicion, *id.* at 968.

A similar reasonableness analysis would restrain certain types of cell phone searches under *Robinson*. The inherent risks in a custodial arrest, along with the reduced privacy expectations of the arrestee, must be

balanced against the wide range of private data available in a cell phone. But ultimately the question of what constitutes an unreasonable cell phone search should be left for another day. The majority has outlined some of the more troubling privacy invasions that could occur during a warrantless search. So long as they remain in the hypothetical realm, I think it premature to draw the line. Suffice it to say that, for the reasons I have stated, the search in this case fell on the constitutional side of that line.[19]

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[19] If there had been a constitutional violation here, the application of the good faith exception would present an interesting question. Because I would find no constitutional violation, however, I do not address the government's good faith exception argument. But I disagree with the majority's decision not to consider the good faith exception to the extent that it based that decision on the government's failure to invoke the exception before the district court. We may affirm on any basis apparent from the record. *See United States v. Sanchez*, 612 F.3d 1, 4 (1st Cir. 2010). Of course, if the record is underdeveloped because the appellee did not present the issue to the district court, the appellee must suffer the consequences. *See Giordenello v. United States*, 357 U.S. 480, 488, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958) ("To permit the Government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond. This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to . . . adduce evidence of his own to rebut the contentions that the Government makes here for the first time.").

Such is not the case here. The good faith exception is merely an extension of the government's main argument that this search complied with existing law. The factual record appears suffi-

I respectfully dissent.

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ciently developed to allow our consideration of this argument, and the government, by raising it in its brief on appeal, gave Wurie the opportunity to respond in his reply brief. Thus, I would not bypass this argument merely because the government first raised it on appeal. *See Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1200 (10th Cir. 2011) (holding that an appellate court may affirm on an alternate ground "provided that the alternate ground is within our power to formulate and the opposing party has had a fair chance to address it") (citations omitted) (internal quotation marks and alterations omitted).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 11-1792

UNITED STATES OF AMERICA, APPELLEE

v.

BRIMA WURIE, DEFENDANT-APPELLANT

Entered: Aug. 2, 2013

ORDER OF THE COURT

The Government's unopposed motion seeking clarification of the court's May 17, 2013 judgment is granted. The court's judgment vacates the defendant's convictions only on counts I and III of the indictment. The conviction on count II stands.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Kelly Begg Lawrence
Dina Michael Chaitowitz
John Albert Wortmann, Jr.
Ian Gold
Michael R. Dreeben
Brima Wurie

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Crim. No. 08-10071-RGS

UNITED STATES OF AMERICA

v.

BRIMA WURIE

Filed: May 4, 2009

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

STEARNS, District Judge.

On March 27, 2008, a Grand Jury returned a three-count Indictment against Brima Wurie charging him with: (i) felony possession of a firearm and ammunition; (ii) distribution of cocaine base (crack cocaine) within 1000 feet of a school; and (iii) possession of crack cocaine with intent to distribute. Wurie was arrested on September 5, 2007, on suspicion of selling a small quantity of drugs. He was transported to the Area C-6 station in South Boston. There, his personal property was inventoried. Information gleaned

from one of Wurie's cell phones led officers to his apartment. Pursuant to a warrant, police seized 215 grams of crack cocaine and a loaded firearm from Wurie's apartment.

Wurie moves to suppress the evidence seized from his person incident to his arrest and later from his apartment, arguing that "police violated his constitutional rights as guaranteed to him by the Fourth, Sixth and Fourteenth Amendments," that the "stop and seizure were conducted without probable cause, without consent, without a properly issued search warrant, and without any other legal justification . . . [and, that] the seizure of his personal belongings and later use by the police of his phone and keys were done in violation" of these same rights.[1] The court heard argument on the motion on January 20, 2009. At the conclusion of the hearing, the court granted Wurie leave to file a supplemental brief, but none has been forthcoming.

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[1] The court will limit its discussion to Wurie's Fourth Amendment claim. The protections of the Sixth Amendment apply to a defendant only after indictment. *Kirby v. Illinois*, 406 U.S. 682, 688-689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). The reference to the Fourteenth Amendment is difficult to fathom. The Fourth Amendment provides Wurie with an "explicit textual source of constitutional protection" against any unlawful police intrusion on his right of privacy. Consequently, any Fourteenth Amendment claim is superfluous. *See Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

BACKGROUND

As there are no disputed material facts, the court will rely on the factual recitations in the warrant affidavit and the parties' pleadings.[2] Sergeant Detective Paul Murphy is a twenty-two year police veteran and the supervisor of the Area C-6 Drug Control Unit. On September 5, 2007, shortly before 6:45 p.m., while patrolling in an unmarked vehicle, Murphy observed a man (later identified as Fred Wade), talking on a cell phone in the parking lot of a Lil Peach convenience store on Dorchester Avenue. Wade was intently watching passing traffic. A few minutes later, Murphy saw a white 2007 Nissan Altima sedan turn into the parking lot. Wade got into the front passenger seat. The only other occupant of the car was the driver (later identified as Wurie). Wurie drove from the lot, turning left onto Dorchester Avenue in the direction of D Street. Murphy followed. Wurie drove approximately one hundred and fifty yards, made a U-turn, and returned to the Lil Peach. Wade left the car and entered the Lil Peach. Wurie then drove away.

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[2] The only relevant issue with respect to the seizure of the cocaine and firearm as will be seen is one of law, specifically, the propriety of the officers' warrantless examination of the call log of Wurie's cell phone. But for the possible taint, the warrant affidavit fully satisfies the probable cause requirement of the Fourth Amendment.

Believing that he had witnessed a drug transaction,[3] Murphy broadcast the make, model, and license plate number of Wurie's car. Accompanied by Officer Christopher Boyle, Murphy entered the Lil Peach and confronted Wade. Two plastic bags, each containing an 8-ball (3.5 grams) of crack cocaine, were seized from Wade's left front pocket. Wade stated that he had purchased the cocaine from "B." He also told the officers that "B" lived in South Boston and sold crack cocaine in quantities no smaller than an 8-ball.

Officer Steven Smigliani, having heard Murphy's broadcast, spotted and followed the Altima.[4] Murphy radioed Smigliani and told him what Wade had said. Officer Smigliani waited for Wurie to park and exit his car. He then arrested him for distributing cocaine. Wurie was taken to the Area C-6 police station. Police seized two cell phones, a key ring with keys, and $1,275 in cash from Wurie's person.

Approximately 5 to 10 minutes after Wurie was brought to the station, Officers Kevin Jones and Robert England, members of the C-6 Drug Control Unit, examined one of the cell phones seized from Wurie. They observed numerous calls logged on the caller ID

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[3] According to Murphy, a popular method of selling drugs in South Boston is by car delivery, where the parties negotiate a price for the drugs over the phone, the buyer proceeds to an agreed-upon location, the dealer arrives in a car, and the parties consummate the sale in the car. While completing the deal, the parties often drive a short distance to avoid police surveillance.

[4] The Altima had been rented earlier by Wurie.

screen from "my house." When the phone rang, the officers flipped it open, activating the backlight. They observed a "wallpaper" photo of a young black female holding a baby. They also saw that the "my house" calls originated from "617-315-7384." Officer Jones, using a police computer, typed the number into the website "AnyWho" (www.anywho.com). The number was listed to "Manny Cristal" at 315 Silver Street in Boston. The officers did not answer the call or access any other information stored in the phone.

After Murphy gave Wurie a second set of *Miranda* warnings,[5] Wurie stated that he lived at 51 Speedwell Street in Dorchester and that he was in South Boston "cruising around." He denied stopping in the Lil Peach parking lot, denied giving anyone a ride, denied speaking with anyone in South Boston that day, and denied selling cocaine. Based on the large amount of cash Wurie was carrying, his two cell phones, the rented car, the drugs found on Wade, and Wade's description of "B's" mode of drug dealing, Murphy suspected that Wurie was selling 8-balls (a fairly large street-level quantity of crack) out of a hidden mother cache.[6] Murphy also believed that Wurie was lying

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[5] Officer Smigliani had administered *Miranda* warnings to Wurie upon his arrest.

[6] According to Murphy, a telltale characteristic of a drug dealer is the use of two cell phones-one for arranging drug deals and another for personal use, and the use of rental cars to conduct business (to avoid forfeiture of their personal vehicles if caught).

about living in Dorchester and that his true address was 315 Silver Street in South Boston.

Murphy and other Drug Control Unit officers proceeded to 315 Silver Street with the key ring seized from Wurie. There, they found three mailboxes outside the apartment building's front door, one of which had the names "Cristal" and "Wurie" written on it. The lights in the first floor apartment were on. Through the window, Murphy saw a young black woman talking on the phone. She appeared to be the same woman that Jones and England had observed in the cell phone's wallpaper photo. Murphy used Wurie's keys to unlock the door to the front entrance of 315 Silver Street. In the common hallway, one door led to a first floor apartment, another to an apartment on the second floor. Murphy tried to unlock the door to the second floor apartment, using all of the keys on Wurie's key ring, but none worked. He then tried the keys in the first floor apartment door. One key unlocked the door. Without opening the door, Murphy removed the key from the lock and knocked. A young woman (later identified as Yolanda Walker), answered the door. Murphy identified himself as a Boston Police officer and asked Walker to step into the hallway. He could smell the distinct odor of burnt marijuana emanating from inside the apartment. Walker told Murphy that she knew Wurie and that he occasionally stayed at the apartment. She also admitted that he had been in the apartment the night before and earlier that day. The officers then entered the apartment to "freeze" it while they obtained a search warrant. Inside the apartment, the officers found a

sleeping child who resembled the infant pictured on the cell phone's wallpaper. When Murphy returned to the station to prepare the warrant affidavit, he asked Wurie why his keys opened the door to the first floor apartment of 315 Silver Street. Wurie replied, "I don't know."

After obtaining and executing a search warrant, officers recovered from the master bedroom of the apartment 215 grams of crack cocaine, a Smith & Wesson .9 millimeter firearm loaded with five rounds of ammunition, six loose rounds of .40 caliber hollow point ammunition, four plastic bags of marijuana, photographs of Wurie and Walker and other personal papers, drug paraphernalia, and $250 in cash.[7]

DISCUSSION

Probable Cause to Arrest

An arrest must be supported by probable cause for a search to be lawful. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). "Probable cause" is a far less exacting standard than any test implying a degree of relative certainty, or even a "more likely than not" view of the facts. *See United States v. Melvin*, 596 F.2d 492, 495 (1st Cir. 1979). "[P]robable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person

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[7] The Bureau of Alcohol, Tobacco, Firearms and Explosives determined that the .9 millimeter firearm was stolen on April 5, 2005, during a burglary in Columbus, Georgia.

in believing that the individual arrested has committed or was committing an offense." *Commonwealth v. Santaliz*, 413 Mass. 238, 241, 596 N.E. 2d 337 (1992). Probable cause may be based on credible hearsay information that would not itself be admissible at trial. *Draper v. United States*, 358 U.S. 307, 311-312, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959). "When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed." *Beck*, 379 U.S. at 96, 85 S. Ct. 223. In making this assessment, a court will be guided by the collective knowledge or "fellow officer" rule, that is, where police are engaged in a collaborative effort, the knowledge of each officer may be "pooled" in establishing probable cause. *United States v. Cook*, 277 F.3d 82, 86 (1st Cir. 2002). Finally, a court may consider an officer's training and experience in assessing probable cause. Conduct that might be perceived as innocent by a casual onlooker may in the totality of the circumstances appear suspicious to a trained officer. *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002).

Based on his experience, his knowledge of the methods used by drug dealers, and his observations of the interaction between Ward and Wurie, Murphy reasonably believed that he had witnessed a drug transaction on September 5, 2007. *See United States v. Sokolow*, 490 U.S. 1, 9, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). When Ward admitted purchasing the crack

cocaine found on his person from someone who could only have been Wurie, Murphy had probable cause to instruct Officer Smigliani to place Wurie under arrest. *See United States v. Harris*, 403 U.S. 573, 583, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971) (an informant's admissions of his own criminal involvement-his "declarations against penal interest"-carry their own inherent indicia of credibility).

The Seizure of Wurie's *Keys and Cell Phones*

"If an arrest is lawful, the arresting officers are entitled to search the individual apprehended pursuant to that arrest. The permissible purposes of such a search include preservation of evidence . . . and seizure of destructible contraband." *United States v. Uricoechea-Casallas*, 946 F.2d 162, 165 (1st Cir. 1991) (internal citations omitted). A full search of the person, his effects, and the area within his immediate reach at the time of a lawful custodial arrest may be conducted without regard to any exigency or the seriousness of the offense, and regardless of any probability that the search will yield a weapon or evidence of the crime for which the person is arrested. *United States v. Robinson*, 414 U.S. 218, 236, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

The holding of *United States v. Edwards*, 415 U.S. 800, 803, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974), that "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention," is extended by *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983), to a booking search,

although on a theory of a search incident to custody. "[I]t is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any *container* or article in his possession, in accordance with established inventory procedures." *Id.* at 648, 103 S. Ct. 2605 (emphasis added). Thus, it is irrelevant whether the keys and cell phones were taken from Wurie by Officer Smigliani immediately upon Wurie's arrest or were seized from his person at the booking (the record is not entirely clear on this point).

The "Search" of the Cell Phone

Neither the Supreme Court nor the First Circuit has directly considered the issue of whether a search incident to arrest may include a search of a cell phone's contents, and if it does, how thorough the search might be.[8] It seems indisputable that a person

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[8] The issue is whether Officers Jones and England were entitled to look at the call log on Wurie's cell phone without a warrant. No cognizable issue would be raised if the officers in fact examined Wurie's phone after it had been inventoried (again the record is not clear). The prevailing rule does not bar police from taking a "second evidentiary look" at inventoried personal property whether in connection with the crime of arrest or an unrelated crime; *United States v. Johnson*, 820 F.2d 1065, 1072 (9th Cir. 1987); *United States v. Jenkins*, 496 F.2d 57, 73-74 (2d Cir. 1974); Wayne R. LaFave, *3 Search and Seizure*, § 5.3(b) (4th ed. 2004). *See also United States v. Grill*, 484 F.2d 990, 991 (5th Cir. 1973) (key found on arrestee's person and placed with inventoried property later retrieved and used to open the lock on a duffle bag; reasonable

has a subjective expectation of privacy in the contents of his or her cell phone. See, e.g., *United States v. Finley*, 477 F.3d 250, 259-260 (5th Cir. 2007) (defendant had a sufficient privacy interest in his cell phone's call records and text messages to challenge their search; the search of the stored text messages, however, was permissible as incident to a valid arrest). Decisions of district courts and Courts of Appeals (often analogizing cell phones to the earlier pager technology) trend heavily in favor of finding that the search incident to arrest or exigent circumstances exceptions apply to searches of the contents of cell phones. *See United States v. Mercado-Nava*, 486 F. Supp. 2d 1271, 1277 (D. Kan. 2007) (the same exceptions apply to warrantless searches of cell phones under the Electronic Communications Privacy Act as any other warrantless search.); *United States* v. *Deans*, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008) (agreeing with the Fifth Circuit that, "if a cell phone is lawfully seized, officers may also search any data electronically stored in the device."); *United States v. Valdez*, 2008 WL 360548, at *3 (E.D. Wis. Feb. 8, 2008) (search of defendant's phone was contemporaneous with his arrest and the officer was reasonably concerned that if he delayed, the information on the phone would be lost); *United States v. Lottie*, 2008 WL 150046, at *3 (N.D. Ind. Jan. 14, 2008) (warrantless search of a cell phone justified by exigent circum-

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grounds to believe that the key would connect the defendant with the incriminating bag).

stances); *United States v. Dennis*, at * 2007 WL 3400500, (E.D. Ky. Nov. 13, 2007) (search of a cell phone incident to valid arrest no different from the search of any other type of evidence seized incident to arrest); *United States v. Parada*, 289 F. Supp. 2d 1291, 1304 (D. Kan. 2003) (phone seized incident to valid arrest; exigent circumstances justified accessing cell phone's call records because continuing incoming calls would overwrite memory and destroy evidence); Cf. *United States v. Morales-Ortiz*, 376 F. Supp. 2d 1131 (D.N.M. 2004) (otherwise unlawful search of cell phone's memory for names and numbers was justified under the inevitable discovery doctrine); *United States v. James*, 2008 WL 1925032 (E.D. Mo. April 29, 2008) ("[T]he automobile exception allows the search of the cell phone just as it allows a search of other closed containers found in vehicles.").[9] *See also United*

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[9] *But see United States v. Wall*, 2008 WL 5381412, at *3-4 (S.D. Fla. Dec. 22, 2008) (declining to follow *Finley*; exigent circumstances might justify a warrantless search of a cell phone; but declining to allow a search of arrestee's cell phone incident to arrest; likening information stored in cell phone to a sealed letter); *United States v. Quintana*, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009) (officers may be justified in searching the contents of a cell phone for evidence related to the crime of arrest, but "[w]hether a cell phone may be searched incident to an arrest to prevent the destruction or concealment of evidence of another crime is a different issue."); *United States v. Park*, 2007 WL 1521573, at *9 (N.D. Cal. May 23, 2007) (based on "the quantity and quality of information that can be stored" a cell phone "should not be characterized as an element of an individual's clothing or person [subject to search incident to arrest], but rather as a 'possession within an

States v. Reyes, 922 F. Supp. 818, 834 (S.D.N.Y.1996) (warrantless searches of the stored memory of two pagers justified (i) as incident to arrest and (ii) by general consent); *United States v. Chan*, 830 F. Supp. 531, 535-536 (N.D. Cal. 1993) (warrantless search of pager memory comparable to a search of container contents; search was not so remote in time to invalidate it as a search incident to arrest); *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1223 (11th Cir. 1993) (agents reasonably activated defendant's pager to confirm its number). Cf. *United States v. Thomas*, 114 F.3d 403, 404 n. 2 (3d Cir. 1997) (noting in dicta that the retrieval of a phone number from a pager found on defendant was a valid search incident to arrest).

The search of Wurie's cell phone incident to his arrest was limited and reasonable. The officers, having seen the "my house" notation on Wurie's caller identification screen, reasonably believed that the stored phone number would lead them to the location of Wurie's suspected drug stash. *See United States v. Sheehan*, 583 F.2d 30, 32 (1st Cir. 1978) (copying the names and telephone numbers from a list found in arrestee's wallet was proper under *United States v. Edwards*, as "it would seem to be equally respectable police work to assume that checking out known associates of a suspect in a bank robbery committed by several people might yield helpful information."). *Id.* I

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arrestee's immediate control that has fourth amendment protection at the station house.'").

see no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant's person that fall within the *Edwards-Lafayette* exceptions to the Fourth Amendment's reasonableness requirements. *See e.g. United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993) (contents of an address book in arrestee's wallet); *United States v. Rust*, 650 F.2d 927, 928 (8th Cir. 1981) (per curiam) (arrestee's pockets); *United States v. Garcia*, 605 F.2d 349, 355 (7th Cir. 1979) (hand-held luggage); *United States v. Castro*, 596 F.2d 674, 677 (5th Cir. 1979) (man's wallet); *United States v. Moreno*, 569 F.2d 1049, 1052 (9th Cir. 1978) (woman's purse).

Briefly addressing the remaining issues, I see nothing unlawful in the use of Wurie's key to enter the common hallway of the apartment building at 315 Silver Street;[10] the insertion of Wurie's key in the lock of the apartment door to determine whether it fit,[11] or

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[10] *See United States v. Hawkins*, 139 F.3d 29, 32 (1st Cir. 1998) ("It is now beyond cavil in this circuit that a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building.").

[11] *See United States v. DeBardeleben*, 740 F.2d 440, 445 (6th Cir. 1984) (insertion of keys in automobile locks to determine ownership did not infringe any significant Fourth Amendment interest); *United States v. $109,179 in U.S. Currency*, 228 F.3d 1080, 1087-1088 (9th Cir. 2000) (same); *United States v. Lyons*, 898 F.2d 210, 212-213 (1st Cir. 1990) (same, padlock on storage locker); *Commonwealth v. Alvarez*, 422 Mass. 198, 209-210, 661 N.E. 2d 1293 (1996) (exterior door lock of an apartment); *Commonwealth v.*

the "freezing" of the apartment to maintain the status quo while police obtained a warrant.[12]

DeJesus, 439 Mass. 616, 627 n.10, 790 N.E. 2d 231 (2003) (same); *State v. Church*, 110 N.C. App. 569, 430 S.E. 2d 462, 466 (1993) (garage door).

[12] Having smelled the odor of burnt marijuana, the officers had probable cause to believe that drugs were present. "The case law is consentient that when a law enforcement officer detects the odor of marijuana emanating from a confined area . . . that olfactory evidence furnishes the officer with probable cause to conduct a search of the confined area." *United States v. Staula*, 80 F.3d 596, 602 (1st Cir. 1996). It was also reasonable for their safety to enter and secure the apartment while they (commendably) waited for a warrant to arrive. "Securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of the dwelling or its contents." *Commonwealth v. Blake*, 413 Mass. 823, 829, 604 N.E. 2d 1289 (1992) (citing *Segura v. United States*, 468 U.S. 796, 810, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)). *See also Illinois v. McArthur*, 531 U.S. 326, 333-334, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001). I do not, on the other hand, agree with the government that the entry of the apartment can be justified as a "protective sweep." *See United States v. Martins*, 413 F.3d 139, 149 (1st Cir. 2005). "The baseline rule is that police officers, in conjunction with an arrest on residential premises, may undertake a protective sweep so long as they can point to 'articulable facts which, taken together with the rational inferences from those facts,' would warrant a reasonably prudent officer in believing 'that the area harbor[s] an individual posing a danger.'" *Id.* (*quoting Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990) (emphasis added)). "[T]he key is the reasonableness of the belief that the officers' safety or the safety of others may be at risk." *Martins*, 413 F.3d at 150. A protective search "may extend only to a cursory inspection of those spaces where a person

ORDER

For the foregoing reasons, Wurie's motion to suppress is DENIED.

SO ORDERED.

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may be found," and may last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Id.* at 335-336, 121 S. Ct. 946. The officers had no reasonable basis to believe that Walker or her infant child posed any danger to the officers' safety (as opposed to the possible destruction of evidence).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 11-1792

UNITED STATES OF AMERICA, APPELLEE

v.

BRIMA WURIE, DEFENDANT-APPELLANT

Filed: July 29, 2013

ORDER OF COURT

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

LYNCH, Chief Judge, statement on denial of rehearing en banc.

I vote to deny rehearing en banc not because the case does not meet the criteria for en banc review. It clearly does. Indeed, the issues are very important and very complex.

I vote to deny rehearing en banc because I think the preferable course is to speed this case to the Supreme Court for its consideration. There are two very able opinions from this court, and en banc review in this Court could not improve on their presentations of the issues.

The decision in this case creates a circuit split with respect to the validity of warrantless searches of cell phones incident to arrest. State courts similarly are divided. As the government points out, the differing standards which the courts have developed provide confusing and often contradictory guidance to law enforcement. Indeed, the highest court in the state which this case arose has taken a view of the law that is contrary to the decision in this case, leaving the police in need of further guidance.

Only the Supreme Court can finally resolve these issues, and I hope it will.

HOWARD, Circuit Judge, statement on denial of rehearing en banc.

My view of this case has not changed since I dissented from the majority opinion. If anything, my dissent looks better in light of the Supreme Court's recent opinion in *Maryland v. King*, 133 S. Ct. 1958

(2013), in which the Court held as constitutional Maryland's practice of swabbing violent-crime arrestees for DNA samples. The majority opinion, relying on the exact same language that I quoted in dissent, reaffirmed the core holding in *United States v. Robinson*, 414 U.S. 218 (1973)—that the search of a person and items in his immediate control incident to an arrest requires no independent justification other than the arrest itself. *King*, 133 S. Ct. at 1971-72. Indeed, the dissent in King, while taking a more restrictive view of searches incident to arrest, still articulated a rule that likely would have permitted the search of Wurie's cell phone as a search for evidence of the crime he committed. *Id.* at 1982 (Scalia, J., dissenting) ("The objects of a search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest."). This only strengthens my belief that the majority's rule is the only rule under which the search of Wurie's cell phone was unconstitutional. But that rule is simply without precedent.

For prudential reasons, however, I believe en banc rehearing is unnecessary. Ultimately this issue requires an authoritative answer from the Supreme Court, and our intermediate review would do little to mend the growing split among lower courts. Both the Florida Supreme Court and the Ohio Supreme Court have adopted a warrant requirement similar to the one the majority found necessary in this case. *See Smallwood v. State*, 113 So. 3d 724 (Fla. 2013); *State v. Smith*, 920 N.E. 2d 949 (Ohio 2009). Leaving aside these outliers (and make no mistake, we are now an

outlier in this field), those courts in agreement on this issue have often reached the same conclusions relying on different reasoning. *Compare United States v. Flores-Lopez*, 670 F.3d 803, 809-10 (7th Cir. 2012) (looking at risk to officer safety and preservation of evidence), and *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007) (analyzing the issue as a matter of searching for evidence of the crime of arrest). Clearly, cell phones sit at the intersection of several different Fourth Amendment doctrines, and I suspect that each new case will result in a slightly different interpretation of how to treat these searches. Given this likely outcome, I welcome speedy resolution from the Supreme Court, and see no need to delay by re-considering this case.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 13-212

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

UNITED STATES OF AMERICA,
Petitioner,

-v.-

BRIMA WURIE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police to search the contents of a cell phone seized from a person who has been lawfully arrested, without first obtaining a search warrant?

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STATEMENT

As described in the First Circuit opinion, Boston police officers stopped an individual whom they believed had just engaged in a drug transaction with Brima Wurie and found him to be in possession of crack cocaine. That individual identified Wurie as the person from whom he had bought the drugs and said that Wurie lived in South Boston. Wurie, who was being followed by other officers, was arrested after he parked his car and taken to the police station; two cell phones, keys and cash were seized from him there. *United States v. Wurie*, 728 F.3d 1, 1-2 (1st Cir. 2013). Officers saw that one of the phones "was repeatedly receiving calls from a number identified as 'my house' on the external caller ID screen on the front of the phone." *Id.* at 2. An officer opened the phone, pressed a button to access the phone's call log and then pressed another button to find the telephone number associated with the "my house" calls. *Id.* An officer used an online telephone directory to obtain an address for that phone number. *Id.* Officers went to that address, occupied by a woman and a baby, "entered the apartment to 'freeze' it while they obtained a search warrant" and, during the execution of the warrant, seized, *inter alia*, a firearm, crack cocaine and marijuana *Id.*

Wurie was charged in a three-count indictment with being a felon in possession of a firearm (count 1), distribution of cocaine base (the drugs seized from the individual) (count 2), and possession with intent to distribute cocaine base (the drugs seized from the apartment) (count 3).

Wurie moved to suppress the evidence obtained as a result of the warrantless search of his cell phone; the district court denied the motion. A jury convicted Wurie on all counts after a four-day trial. The district court sentenced Wurie to a term of 262 months on counts 1 and 3 and 240 months on count 2, to be served concurrently.

On appeal to the U.S. Court of Appeals for the First Circuit, that court, after noting that federal and state courts have addressed warrantless cell phone data searches with "a variety of approaches" and "disparate reasoning," 728 F.3d at 5-6, rejected the government's argument that the search of the cell phone was simply a permissible warrantless search incident to arrest under *United States v. Robinson*, 414 U.S. 218 (1973), and *United States v. Edwards*, 415 U.S. 800 (1974). The court recognized the privacy interest in cell phone data, noting the storage capacity and access to information provided by "'[e]ven the dumbest of modern cell phones,'" *id.* at 8-9 & n.10, and the potential access to a large array of personal information from a search. The court analyzed the search of the data in a cell phone under the rationales of *Chimel v. California*, 395 U.S. 752 (1969), as described in *Arizona v. Gant*, 556 U.S. 332, 339 (2009) – "protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy" – and concluded that neither rationale justified the warrantless search of Wurie's cell phone for two reasons.

First, the government did not argue that cell phone data searches were necessary for officer protection. 728 F.3d at 10. Second, the suggestion that the search was "arguably" necessary to prevent the destruction of evidence was more theoretical than real, and "[w]eighed against the significant privacy implications inherent in cell phone data searches, we view such a slight and truly theoretical risk of evidence destruction as insufficient." *Id.* at 10-11. Thus, consistent with the approach taken in *Robinson*, the court of appeals held that "warrantless cell phone data searches are *categorically* unlawful under the search-incident-to- arrest exception, given the government's failure to demonstrate that they are ever necessary to promote officer safety or prevent the destruction of evidence." *Id.* at 12 (emphasis in original). The court also noted that the government had not raised

other exceptions to the warrant requirement, such as the exigent circumstances exception, which might justify a warrantless search of cell phone data under certain circumstances. *Id.* at 13-14.

The dissent viewed the search of Wurie's cell phone as within the scope of a permissible search incident to arrest. It was limited to a search for a particular phone number and was, in the dissent's view, no different from the search of containers such as a wallet or address book, both of which had been upheld by courts. 728 F.3d at 15-17. The dissent also concluded that there was a risk that others might have destroyed evidence after Wurie did not answer his phone. *Id.* at 17.

The First Circuit denied the government's motion for rehearing en banc on July 29, 2013. *See* Doc. 00116566242 (filed July 16, 2013); Doc. 00116561839 (filed July 29, 2013)

On July 16, 2013, the government filed a motion "to clarify that the Court's judgment 'vacat[ing] [Wurie's] conviction' applies only to Counts One and Three of the Indictment." It "assume[d]" the court did not intend to vacate Wurie's conviction on the distribution charge because, as had been noted in a footnote of the government's brief, the evidence on that count stemmed from the testimony of an officer describing the alleged sale and the cocaine seized from an individual after that event, all of which occurred prior to Wurie's arrest and the warrantless search of his cell phone. *See* Doc. 00116556244 (filed July 16, 2013). The court granted the government's motion on August 2, 2013, stating that "[t]he conviction on count II [upon which the district court had imposed a twenty-year sentence] stands" Doc. 00116564386 (filed Aug. 2, 2013). The court denied Wurie's motion for reconsideration, in which he asserted that the evidence obtained as a result of the warrantless cell phone search did, in fact, play a significant role in the conviction on count 2, without opinion on August 30, 2013. *See* Doc. 00116566386 (filed Aug. 7, 2013); Doc. 00116576470 (filed Aug. 30, 2013).

REASONS FOR DENYING THE WRIT

I. Review Should Await Further Development of the Issue in the Circuit Courts of Appeals and State High Courts

A. Introduction

The Fourth, Fifth, and Seventh Circuits and the highest courts of the states of California, Georgia, and Massachusetts have upheld warrantless searches of cell phones incident to arrest with varying rationales.[1] The First Circuit, the highest courts of the states of Florida and Ohio and federal district courts in California and Florida have rejected warrantless cell phone searches incident to arrest with varying rationales. The varied rationales underlying these opinions, the fact that eight United States Courts of Appeals (and most state high courts) have not addressed the issue in precedential opinions, and the rapid rate at which the technology involved is evolving, all counsel waiting for the lower federal and state courts to further evaluate the array of legal issues and the impact of technological advances involved in this area before this Court resolves what differences, if any, will remain after further development.

B. Current Judicial Decisions

All of the judicial decisions in this area address this Court's search incident to arrest jurisprudence, as expressed in *Chimel v. California*, 395 U.S. 752 (1969), *United States v. Robinson*, 414 U.S. 218 (1973), *United States v. Edwards*, 415 U.S. 800 (1974), *United States v. Chadwick*, 433 U.S. 1 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991), and

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[1] The Tenth Circuit, in an unpublished opinion, not precedential under its rules (10th Cir. R. 32.1(A)), simply asserted, without analysis, that "the permissible scope of a search incident to arrest includes the contents of a cell phone found on the arrestee's person," citing *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007) (discussed *infra* at 7). *Silvan W. v. Briggs*, 309 F. App'x. 216, *6 (10th Cir. 2009).

Arizona v. Gant, 556 U.S. 332 (2009). At this time, there are differing views as to how those decisions apply and should apply to searches of cell phones seized from people who have been arrested.

1. Cases Holding That the Contents of a Cell Phone May Not Be Searched Incident to Arrest Without a Search Warrant

The First Circuit opinion examined the privacy interest in cell phone data in today's society and the potential invasion of privacy from law enforcement access to that data, and viewed the cell phone as more than a mere container such as a cigarette pack. In rejecting the government's argument that the warrantless search of Mr. Wurie's cell phone was justified as incident to his arrest, the court focused on the rationales for warrantless searches incident to arrest described and applied by this Court in *Chimel* and *Gant* – officer safety and the prevention of destruction of evidence – and concluded that those rationales did not support categorical warrantless searches of cell phones seized incident to arrest. The court recognized that particular circumstances may justify a warrantless cell phone search under other recognized exceptions to the warrant requirement.

Federal district courts have also refused to uphold warrantless cell phone searches as incident to arrest. In *United States v. Wall*, 2008 WL 5381412 (S.D. Fla. 2008), *aff'd on other grounds*, 343F. App'x 564 (11th Cir. 2009), the district court viewed the search of the defendant's cell phone for text messages during the booking process as not supported by the rationales of a search incident to arrest, officer safety and preservation of evidence – but instead as analogous to the search of a sealed letter, requiring a warrant. *Id.* at *3. The court specifically rejected the reasoning of *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007). In *United States v. Park*, 2007 WL1521573 (N.D. Cal. 2007), the court viewed searches of defendants' cell phones at a police station approximately

90 minutes after their arrests as searches of possessions within their immediate control rather than searches of their person and, therefore, not lawful searches incident to arrest. In reaching that conclusion, the court recognized the cell phone's "capacity for storing immense amounts of private information." *Id.* at *8. The court also noted that the searches went "far beyond the original rationales for searches incident to arrest." *Id.*

The Florida Supreme Court held that *Robinson* was "neither factually nor legally on point" to a determination of the constitutionality of the warrantlesss search of a cell phone seized from an arrestee's person at the time of his arrest for stored data, including photographs. *Smallwood v. State*, 113 So.3d 724, 730 (Fla. 2013). The court viewed the "extensive information and data held in a cell phone" as a fact not involved in *Robinson*, *id.* at 731, and the cell phone of today as "materially distinguishable" from the "static, limited-capacity cigarette packet in *Robinson*" both quantitatively and qualitatively, *id.* at 732. Applying *Chimel* and *Gant*, the court concluded that once the officer obtained possession of the defendant's cell phone, the decisions' rationales for a warrantless search did not apply and a warrant was required to search the contents of defendant's cell phone. *Id.* at 735. The court viewed the cell phone search as "akin to providing law enforcement with a key to access the home of the arrestee....We refuse to authorize government intrusion into the most private and personal details of an arrestee's life without a search warrant simply because the cellular phone device which stores that information is small enough to be carried on one's person." *Id.* at 738.

In *State v. Smith*, 124 Ohio St.3d 163, 920 N.E.2d 949 (2009), the Ohio Supreme Court held that the warrantless search of a cell phone seized from defendant at the time of his arrest for call records and phone numbers violated the Fourth Amendment. The court refused to characterize a cell phone as a "closed container," deeming the container analogy inapposite given a cell phone's

capacity to store "a wealth of digitized information wholly unlike any physical object found within a closed container." *Id.* at 168. Finding a reasonable and justifiable privacy interest in cell phones given their ability to store large amounts of private data, a privacy interest that went beyond that in an address book or pager, and finding state interests in collecting and preserving evidence, as well as officer safety, to be met when a cell phone has been reduced to police custody, the court concluded that a cell phone's contents could not be searched incident to arrest without a warrant. *Id.* at 169.

2. Cases Holding That the Contents of a Cell Phone May Be Searched Incident to Arrest Without a Search Warrant

The rationales in opinions affirming cell phone searches incident to arrest range widely. Courts have adopted the view of a cell phone as a closed container, viewed the privacy intrusion as minimal; and viewed the potential for lost evidence as key. The Fifth Circuit's opinion in *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007), affirming the warrantless search of a cell phone's call records and text messages, treated the cell phone as a closed container subject to search incident to arrest and relied on *Robinson* for the authority to search for evidence of the arrestee's crime. In *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009), the Fourth Circuit focused on the need to preserve evidence as the justification for the warrantless search of a cell phone seized incident to arrest for call records and text messages, and rejected an argument that such a search was justified only if the phone had a small storage capacity giving rise to the possibility that information would be lost through automatic deletion.

The Seventh Circuit addressed the search of a cell phone seized from the defendant's person incident to his arrest for its phone number in *United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir.

2012). It viewed the modern cell phone as a type of computer capable of holding "a vast body of personal data", qualitatively different from other conventional physical closed containers such as a purse or an address book. *Id.* at 805. It discussed whether what it deemed "trivial" intrusions required warrants, and the analogy between obtaining a phone's number or address book and opening a diary for the owner's address or leafing through a pocket address book. *Id.* at 806-807. However, the court ultimately decided the case on its conclusion that there was a conceivable, even if not probable, risk of loss of evidence from "remote wiping" of the phone's contents before a warrant could be obtained and the search for the cell phone's number was no more invasive than the search of a conventional container. *Id.* at 807-10. It left unanswered the questions about privacy interests and more extensive searches that it had raised.

In *Hawkins v. State*, 290 Ga. 785, 723 S.E.2d 924 (2012), the Georgia Supreme Court cited *Finley* and the district court opinion in this case (*United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009)) for its conclusion that a cell phone is "roughly analogous" to a container and could, therefore, be searched for text messages exchanged with an undercover officer incident to the arrest of an individual for an attempted drug transaction with that officer. 290 Ga. at 786-87. It rejected any suggestion "that the potential volume of information contained in a cell phone changes its character," *id.* at 787, but viewed the potential volume of information as relevant to the scope of the search permitted to be reviewed in each case. The court also noted that other courts had recognized the potential for the loss of information from cell phones or other similar devices. *Id.* at 787 n.3.

In *Commonwealth v. Phifer*, 463 Mass. 790, 979 N.E.2d 210 (2012), the Supreme Judicial Court of Massachusetts held only that "a limited search of a defendant's cellular telephone's recent call history for evidence directly relating to the crime for which defendant was arrested" was

permissible. It did not address "whether, when a cellular telephone is validly seized incident to arrest, it may always, or at least generally, be searched without a warrant, and if so, the permissible extent of such a search." *Id.* at 791. The court noted a divergence of opinion as to the treatment of the characteristics of cell phones. *Id.* at 794 n.5. The court applied the same analysis, with the same caveats, in another case decided the same day. *See Commonwealth v. Berry*, 463 Mass. 800, 979 N.E.2d 218 (2012).

The Supreme Court of California, in *People v. Diaz*, 51 Cal.4th 84, 244 P.3d 501 (2011), categorized the warrantless search of the text message folder of a cell phone taken from the defendant after his arrest and searched approximately 90 minutes later as incident to arrest based on its conclusion that the phone was, like the cigarette package in *Robinson* and the clothes in *Edwards*, and unlike the footlocker in *Chadwick*, "'personal property.. immediately associated with [his] person.'" *Id.* at 93. Whether the phone was a container was irrelevant; the question under this Court's cases was whether it was property. *Id.* at 99-100. It viewed the character of the cell phone, including its capacity for storing personal information, to be irrelevant. *Id.* at 94-95. A concurring justice joined the majority rather than the dissent "under the compulsion of directly applicable United States Supreme Court precedent." *Id.* at 103. A dissenting justice viewed this Court's precedent as "not on all fours" with the case before it and the rationale of the cases relied on by the majority as not applicable to the delayed warrantless search of the cell phone seized from the defendant at the time of his arrest. *Id.* at 108-09. It discussed the scope of the "potential intrusion on informational privacy involved in a police search of a person's mobile phone, smartphone, or handheld computer," *id.* at 104; the distinction between electronic devices and the types of "containers" addressed in this Court's decisions, *id.* at 109; the lack of justification for warrantless action when the phone had been

reduced to the exclusive control of the police, *id.* at 106; and a distinction between bodily privacy and informational privacy, *id.* at 110. It concluded that an arrest could not justify a warrantless search of a cell phone's stored data once the phone was in the exclusive control of the police. *Id.* at 111.

C. Issues That Could Benefit From Further Exploration and Development

Thus, the cases decided to date suggest there are a number of issues that could benefit from further evaluation and consideration, including:

Is a cell phone within the category of property intimately associated with an arrested person? Or is it a possession within an arrestee's immediate control? Is a cell phone simply a closed container? Or is it a repository of such an array of personal and private information that it should be treated differently from a closed container? What expectations of privacy are to be associated with a cell phone? Do expectations of privacy differ based on type of cell phone? Is the availability of cell phone records from the service provider even if the records are overridden or deleted from the cell phone itself a consideration in evaluating potential risk of loss of evidence from seizing but not searching a cell phone without a warrant?

Resolution of the question presented would benefit from further exposition and analysis of these issues in the eight circuits that have not yet addressed the issue in published opinions and/or further consideration by the circuits that have addressed some of the issues, and, perhaps, by further development in state courts.

D. The Impact of Changing Technology

Allowing additional time for lower courts to evaluate and address the impact of changing technology on expectations of privacy may also assist this Court in addressing the issue in the future.

This Court stated in *City of Ontario v. Quon*, 560 U.S.746, 130 S. Ct. 2619, 2629 (2010), that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." The Court then decided the issue before it on narrower grounds than employees' privacy expectations when using an employer-provided pager capable of sending and receiving texts. This Court also stated: "Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior." *Id.* Further, "[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy." *Id.* at 2630. *See also United States v. Jones*, ___ U.S. ____, 132 S. Ct. 945, 955-957 (2012) (Sotomayor, J., concurring) (raising difficult questions about the impact of changes in the use of technology and its affect on societal expectations of privacy); *id.* at 962-64 (Alito, J., concurring in judgment) (addressing use of GPS for long term tracking and the potential impact of the use of technological advances on expectations of privacy).

According to the Pew Research Center, as of May 2013, 91% of the adult population in the United States owns some kind of cell phone, with 56% now owning a smartphone.[2] Phones may allow access to texts and e-mails as well as social media, exposing not only contacts but the content of communications. At present, more and more individuals store their information on networks run by third parties with varying degrees of security (the "cloud") and accessed through the cell phone. A person's phone may serve as a portal to information stored outside the phone, linked to cloud

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[2] Aaron Smith, Pew Research Center, "Smartphone Ownership - 2013 Update" (June 5, 2013) p.2, available at http://pewinternet.org/Reports/2013/Smartphone-Ownership-2013.aspx.

network storage for both personal and business data. It may contain passwords to protected sites, allowing access to bank or medical records. The evolution of cell phone technology into cloud-based technology may make a difference to the individual's subjective expectation of privacy or society's view of an objectively reasonable expectation of privacy in cell phone information. That issue, however, has not been raised, much less addressed, in the lower court decisions to date.

The changing technology of the phones themselves may raise additional issues. The newest models use biometrics and other methods to control access. Whether an individual could be required to provide access to officers who have seized his/her phone is yet another issue not yet raised or addressed in the decisions to date.

II. Given the Nature of Mr. Wurie's Phone and the First Circuit's Decision to Leave Mr. Wurie's Conviction on One Count of the Indictment Intact, This Case Does Not Provide a Good Vehicle for Addressing the Propriety or Permissible Scope of Warrantless Searches of Cell Phones Incident to Arrest

The cell phone at issue here was a comparatively unsophisticated flip phone. Today's smart phones have an exponentially greater capacity to store and access a wider range of data than earlier cell phones like Mr. Wurie's. Moreover, the search here was a comparatively limited search for a telephone number. Thus this case is not an appropriate vehicle to resolve the question of the application of the search incident to arrest rationale to the warrantless search of a cell phone seized from an arrestee. Even if it were, and assuming, solely hypothetically, the constitutionality of some warrantless search of a cell phone incident to arrest, this case does not present the broader issues of what, if any, limitations should be placed on the scope of such a cell phone search.

Finally, in granting the government's motion to "clarify" its judgment and asserting that Wurie's conviction for distribution of cocaine base (count 2) stands, the First Circuit left intact a

conviction for which Wurie received a 240-month sentence while vacating his 262-month concurrent sentences on counts 1 and 3. The decision to leave the conviction on count 2 intact also suggests that this Court should await further percolation of the issues and a better vehicle for addressing the issues raised by warrantless searches of cell phones incident to arrest.

III. The First Circuit Fully Considered and Properly Decided the Issue Presented

Respondent submits that the First Circuit came to the correct result. The court evaluated this Court's search-incident-to-arrest jurisprudence from *Chimel v. California* to *Arizona v. Gant*, including *United States v. Robinson*, *United States v. Edwards*, and *United States v. Chadwick*, as well as the decisions from other courts addressing warrantless searches of cell phone data. The search of a cell phone, with its ability to store and access large quantities of even the most personal data, could not be validly equated with the search of the type of containers at issue in *Robinson* and other container search cases, or the search of clothing at issue in *Edwards*. The court properly applied the rationales of this Court's search incident to arrest jurisprudence to the warrantless search of cell phone data, and correctly concluded that warrantless intrusions were not necessary either to safeguard officer safety or preserve destructible evidence. Accordingly, a warrantless search of the cell phone data was constitutionally impermissible.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

RECORD
AND
BRIEFS

No. 13-212

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BRIMA WURIE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Constitution:

U.S. Const. Amend. IV 1, 3, 4

In the Supreme Court of the United States

No. 13-212

UNITED STATES OF AMERICA, PETITIONER

v.

BRIMA WURIE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent agrees with the government that courts of appeals and state supreme courts have reached conflicting conclusions over the question whether the Fourth Amendment permits a police officer, without obtaining a warrant, to search the contents of a cell phone found on a person who has been lawfully arrested. See Br. in Opp. 4. And he does not dispute that, in light of the modern ubiquity of cell phones, law-enforcement officers in the field need clarity on the scope of their legal obligations. Respondent has identified no significant countervailing considerations that favor postponing resolution of this critical issue. Accordingly, the petition should be granted.

1. Respondent accurately describes (Br. in Opp. 4-10) the division of authority among federal courts of appeals and state supreme courts over the question

presented. But he argues that this Court should delay resolving that conflict because not every circuit has addressed the issue. That contention is unsound. Although eight circuits with criminal jurisdiction have not addressed the question in a published opinion, a total of nine circuits or state supreme courts have now resolved it, dividing 6-3.

Given how many arrestees now carry cell phones, law-enforcement officers need clarity about the scope of their authority to search the contents of a cell phone held on the person of an arrestee, and "the differing standards which the courts have developed provide confusing and often contradictory guidance." Pet. App. 71a (Lynch, C.J.) (statement on denial of rehearing). As Chief Judge Lynch explained below, that problem is especially acute in Massachusetts, where the police are currently subject to two conflicting legal rules. See *ibid.*; see also *Commonwealth* v. *Phifer*, 979 N.E.2d 210 (Mass. 2012); *Commonwealth* v. *Berry*, 979 N.E.2d 218 (Mass. 2012).

Respondent also contends (Br. in Opp. 4, 10-12) that "the impact of technological advances involved in this area" favors delay. Although cell-phone technology is constantly evolving, that factor does not justify leaving for another day the basic issues that have produced lower-court conflicts over cell-phone searches. It will be just as true two years—or ten years—from now that cell-phone technology will be undergoing change. Yet police making arrests need guidance on the fundamental principles that will govern cell-phone search authority today. The technology of cell phones is sufficiently well-developed to addresses these issues. And the parties and amici can provide the Court with a wide variety of views on how the advancing ca-

pabilities of cell phones bear on Fourth Amendment principles.

Respondent also poses (Br. in Opp. 10) a series of questions that might be thought relevant to the question presented. The majority of those questions are conceptual inquiries that this Court is fully capable of answering if it deems them relevant, not practical issues that might be clarified after further consideration in the courts of appeals. And in any event, in light of law-enforcement officers' pressing need for guidance in this area, any benefit to be gained by further postponing resolution of the issue would be outweighed by the cost of delay.

2. This case is an ideal vehicle to resolve the question presented.

a. As the government explained in its petition (at 25-26), the record in this case readily facilitates the Court's consideration not only of the argument that cell-phone searches incident to arrest are categorically lawful under *United States* v. *Robinson*, 414 U.S. 218 (1973), and *United States* v. *Edwards*, 415 U.S. 800 (1974), but also of other legal justifications for cell-phone searches. It is particularly important that the Court have the opportunity to consider these additional doctrinal bases that may guide police practice when an arrestee possesses a cell phone.

Significantly, the district court in this case found in a published opinion that "[t]he officers, having seen the 'my house' notation on [respondent's] caller identification screen, reasonably believed that the stored phone number would lead them to the location of [respondent's] suspected drug stash." Pet. App. 66a. Based on that finding, the government raised the alternative argument in the court of appeals that the

search here was justified on the ground that officers had reason to believe the search would lead them to evidence relevant to the crime of arrest. See Gov't C.A. Br. 40-41; *Arizona* v. *Gant*, 556 U.S. 332, 351 (2009) (holding that officers may search vehicle out of reaching distance of arrestee when "it is reasonable to believe the vehicle contains evidence of the offense of arrest"). Four Justices recently described this as a general basis for a search incident to arrest. See *Maryland* v. *King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting). This Court should have the opportunity to consider the crime-of-arrest theory as a basis for sustaining cell-phone searches incident to arrest.

b. Respondent argues (Br. in Opp. 12) that because "[t]he cell phone at issue here was a comparatively unsophisticated flip phone" and the search was "comparatively limited," this case is an unsuitable vehicle for the Court to articulate the basic Fourth Amendment principles governing cell-phone searches. But the legal issue in this case—the circumstances in which a police officer may search a cell phone found on the person incident to a lawful arrest—is unlikely to have a different outcome depending on the storage capacity of the phone, the phone's multimedia capabilities, or other features that distinguish smartphones from the phone in this case. As the Seventh Circuit has observed, "even the dumbest of modern cell phones gives the user access to large stores of information." *United States* v. *Flores-Lopez*, 670 F.3d 803, 806 (2012). And "to require police officers to ascertain the storage capacity of a cell phone before conducting a search would simply be an unworkable and unreasonable rule." *United States* v. *Murphy*, 552 F.3d 405, 412 (4th Cir.), cert. denied, 556 U.S. 1196 (2009). If

this Court were to fashion a special exception from the categorical rule of *Robinson* and *Edwards* for cell phones, it is not likely that the exception would turn on the model or capabilities of the particular phone.[1]

c. Respondent also argues (Br. in Opp. 12-13) that the fact that the court of appeals did not vacate his conviction on Count 2 militates against further review.[2] But as respondent acknowledges, Count 2 carried a lesser sentence than the two vacated counts. See Pet. 5. If this Court reverses the decision below, respondent will serve an additional 22 months in prison. Accordingly, this case would provide the Court with a clean vehicle to resolve whether the police may

---

[1] Petitioner in *Riley* v. *California*, No. 13-132, suggests that his case provides a better vehicle to resolve the question presented (see Cert. Reply Br. at 4-6 & n.3 (No. 13-132)), because in that case the police conducted a warrantless search of a smartphone, which had an "immense storage capacity and multimedia components." *Riley*, however, appears to have similarly involved a search only of files or information stored on the phone itself. See, *e.g.*, *Riley* Pet. 3 (describing searches of the phone's contacts list, text messages, photographs, and videos). To the extent that the Court would be inclined to draw a line between the search of the call log in this case and the search of the files in *Riley*, either case would provide an opportunity to set out that distinction. And whichever case is granted, this Court will undoubtedly be fully apprised by the parties and amici of the capabilities of a modern cell phone, including its ability to access information on the cloud. See, *e.g.*, Br. of Amici Curiae Ctr. for Democracy & Tech. & Elec. Frontier Found. at 3-9 (No. 13-132). The Court would encounter no difficulty articulating the basic principles governing the authority to search a digital telephone device with multiple capabilities on the facts of this case; the court of appeals did just that.

[2] As respondent notes (Br. in Opp. 3), after the petition was filed, the court of appeals denied his motion for reconsideration of its order clarifying that his conviction on Count 2 was not upset by its judgment.

conduct a warrantless search of the contents of a cell phone found on a person who has been lawfully arrested.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

NOVEMBER 2013

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAR 3 - 2014
OFFICE OF THE CLERK

No. 13-212

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BRIMA WURIE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: AUG. 15, 2013
CERTIORARI GRANTED: JAN. 17, 2014

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No. 11-1792

UNITED STATES OF AMERICA, APPELLEE

v.

BRIMA WURIE
(FEDERAL PRISONER: 24753-038),
DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
7/14/11	CRIMINAL CASE docketed. Notice of appeal (doc. #83) filed by Appellant Brima Wurie. Docketing Statement due 07/28/2011. Transcript Report/Order form due 07/28/2011. Appearance form due 07/28/2011. [11-1792] (AS)
	* * * * *
5/22/12	BRIEF tendered by Appellant Brima Wurie. Certificate of service dated 05/22/2012. [11-1792] (IG)
5/22/12	APPENDIX filed by Appellant Brima Wurie. Number of volumes: 1. Number of copies: 5. Certificate of service dated 05/22/2012. [11-1792] (RL)

DATE	PROCEEDINGS
5/22/12	MOTION for leave to file sealed supplemental appendix filed by Appellant Brima Wurie. Certificate of service dated 05/22/2012. [11-1792] (AS)
5/23/12	APPELLANT'S BRIEF filed by Appellant Brima Wurie. Certificate of service dated 05/22/2012. Brief due 06/25/2012 for appellee United States. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 05/30/2012. [11-1792] (RL)
5/23/12	PLEADING tendered: Sealed supplemental appendix (6) copies (presentence report and statement of reasons) filed by Appellant Brima Wurie. Certificate of service dated 05/22/2012. [11-1792] (RL)
5/23/12	ORDER granting motion to file sealed supplemental appendix filed by Appellant Brima Wurie. [11-1792] (AS)
5/23/12	SEALED SUPPLEMENTAL APPENDIX filed by Appellant Brima Wurie. Number of volumes: 1. Number of copies: 5. Certificate of service dated 05/22/2012. [11-1792] (AS)
	* * * * *
8/9/12	BRIEF tendered by Appellee US. Certificate of service dated 08/09/2012. [11-1792] (KBL)

DATE	PROCEEDINGS
8/10/12	APPELLEE'S BRIEF filed by Appellee US. Certificate of service dated 08/09/2012. Reply brief due 08/27/2012 for appellant Brima Wurie. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 08/17/2012. [11-1792] (RL)
	* * * * *
10/31/12	CASE calendared: Tuesday, 12/04/2012 Boston, MA Panel Courtroom. Designation form due 11/14/2012. [11-1792] (LM)
	* * * * *
12/4/12	CASE argued. Panel: Jeffrey R. Howard, Appellate Judge; Norman H. Stahl, Appellate Judge and Kermit V. Lipez, Appellate Judge. Arguing attorneys: Ian Gold for Brima Wurie and Michael R. Dreeben for US. [11-1792] (LM)
12/7/12	CITATION of supplemental authorities pursuant to Fed. R. App. P. 28(j) filed by Appellee US. Certificate of service dated 12/07/2012. [11-1792] (KBL)
5/17/13	OPINION issued by Jeffrey R. Howard, Appellate Judge; Norman H. Stahl, Appellate Judge and Kermit V. Lipez, Appellate Judge. Published. [11-1792] (AS)

DATE	PROCEEDINGS
5/17/13	JUDGMENT entered by Jeffrey R. Howard, Appellate Judge; Norman H. Stahl, Appellate Judge and Kermit V. Lipez, Appellate Judge. 11-1792 Reversed [11-1792] (AS)
	* * * * *
5/20/13	ERRATA to opinion (published) [5734396-2] filed. [11-1792] (SBT)
	* * * * *
7/16/13	PETITION for rehearing en banc filed by Appellee US. Certificate of service dated 07/16/2013. [11-1792] (KBL)
7/16/13	MOTION to clarify *the Judgment* filed by Appellee US. Certificate of service dated 07/16/2013. [11-1792] (KBL)
	* * * * *
7/29/13	ORDER entered by Sandra L. Lynch, Chief Appellate Judge; Juan R. Torruella, Appellate Judge; Norman H. Stahl, Appellate Judge; Kermit V. Lipez, Appellate Judge; Jeffrey R. Howard, Appellate Judge; Rogeriee Thompson, Appellate Judge and William Joseph Kayatta , Jr., Appellate Judge denying petition for rehearing en banc filed by Appellee US. [11-1792] (AS)

DATE	PROCEEDINGS
8/2/13	ORDER entered by Jeffrey R. Howard, Appellate Judge; Norman H. Stahl, Appellate Judge and Kermit V. Lipez, Appellate Judge. The Government's unopposed motion seeking clarification of the court's May 17, 2013 judgment is granted. The court's judgment vacates the defendant's convictions only on counts I and III of the indictment. The conviction on count II stands. [11-1792] (GK)
8/3/13	MOTION to stay *Mandate for 90 Days* filed by Appellee US. [11-1792] (DMC)
8/7/13	MOTION to reconsider *the Court's Order Granting the Government's Motion to Clarify the Judgment* [5753390-2], [5748836-2] filed by Appellant Brima Wurie. Certificate of service dated 08/07/2013. [11-1792] (IG)

DATE	PROCEEDINGS
8/19/13	ORDER entered by Norman H. Stahl, Appellate Judge: Upon consideration of the Government's unopposed motion to stay the mandate, the motion is granted. The issuance of mandate is hereby stayed until disposition of the petition for writ of certiorari now pending with the United States Supreme Court. Should the petition for writ of certiorari be denied, mandate shall issue forthwith. The Government is directed to promptly notify the Clerk of this court of the Supreme Court's decision on the pending petition for writ of certiorari. [11-1792] (AS)
8/28/13	U.S. SUPREME COURT NOTICE advising a petition for a writ of certiorari was filed on 08/15/2013 and assigned case number 13-212. [11-1792] (AS)
8/30/13	ORDER entered by Jeffrey R. Howard, Appellate Judge; Norman H. Stahl, Appellate Judge and Kermit V. Lipez, Appellate Judge denying motion to reconsider filed by Appellant Brima Wurie. [11-1792] (AS)
1/27/14	LETTER regarding *grant of petition for writ of certiorari* filed by Attorney Kelly Begg Lawrence for Appellee US. Certificate of service dated 01/27/2014. [11-1792] (KBL)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Boston)

Criminal Docket for Case No.: 1:08-cr-10071-RGS-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

BRIMA WURIE, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/27/08	1	INDICTMENT as to Brima Wurie (1) count(s) 1, 2, 3. (Attachments: # 1 JS45) (Smith3, Dianne) (Entered: 03/28/2008)
		* * * * *
9/4/08	17	MOTION to Suppress as to Brima Wurie. (Attachments: # 1 Affidavit Defendant's Affidavit in Support of Motion to Suppress) (Benzan, John) . (Entered: 09/04/2008)
9/11/08		Judge Richard G. Stearns: Electronic ORDER entered as to Brima Wurie. "This Court will not accept the unsigned Affidavit filed by de-

DATE	DOCKET NUMBER	PROCEEDINGS
		fendant Brima Wurie. The affidavit is hereby deemed withdrawn and therefore not to be considered as an exhibit to the pending motion to suppress until such time as counsel files a properly signed document by the defendant. SO ORDERED." R.G. Stearns, USDJ. (Johnson, Mary) . (Entered: 09/11/2008)
9/15/08	18	MOTION to Suppress *Signed Affidavit* as to Brima Wurie. (Benzan, John) (Entered: 09/15/2008)
9/15/08	19	Motion for Leave to File *Motion to Suppress Late* as to Brima Wurie. (Benzan, John) (Entered: 09/15/2008)
9/17/08		Judge Richard G. Stearns: Electronic ORDER entered granting 19 Motion for Leave to File Motion to Suppress late. (Johnson, Mary) (Entered: 09/17/2008)
9/17/08		Judge Richard G. Stearns: Electronic ORDER entered finding as moot 18 Motion to Suppress as to Brima Wurie (1). "this document is not a motion but rather the signed Affidavit of the defendant. The Court will accept it as the signed

DATE	DOCKET NUMBER	PROCEEDINGS
		affidavit in support of the pending motion to suppress, which is #17 on the docket". (Johnson, Mary). (Entered: 09/17/2008)
		* * * * *
10/16/08	21	MEMORANDUM in Opposition by USA as to Brima Wurie re 17 MOTION to Suppress (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Lundgren, Gretchen) (Entered: 10/16/2008)
		* * * * *
1/20/09		Electronic Clerk Notes for proceedings held before Judge Richard G. Stearns: Motion Hearing as to Brima Wurie held on 1/20/2009 re 17 MOTION to Suppress filed by Brima Wurie. After oral argument, the Court allows Atty. Benzan 14 days to brief the issue on the cell phone search, and the Government will have 7 days to file a response if they so wish. The matter will then be taken "under advisement". (Court Reporter James Gibbons.) (Attorneys present: AUSA Lundgren; Atty. Benzan) (Johnson, Mary). (Entered: 01/20/2009)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
5/4/09	27	Judge Richard G. Stearns: ORDER entered. MEMORANDUM OPINION as to Brima Wurie. . . . "for the foregoing reasons, the motion to suppress is DENIED." Richard G. Stearns, USDJ. (Johnson, Mary). (Entered: 05/04/2009)
5/4/09		Judge Richard G. Stearns: Electronic ORDER entered denying 17 Motion to Suppress as to Brima Wurie (1). (Johnson, Mary) (Entered: 05/04/2009)
		* * * * *
2/22/10	45	AMENDED INDICTMENT, removing "WITHIN 1000 FEET OF A SCHOOL" from Count 2 of the original indictment by USA. Amendment to 1 Indictment as to Brima Wurie. (Seelye, Terri) (Entered: 02/25/2010)
		* * * * *
2/25/10	46	JURY VERDICT returned at 4:25 p.m. on 2/25/2010 as to Brima Wurie (1) Guilty on Count 1, 2, 3. (Seelye, Terri). (Entered: 02/25/2010)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/22/10	63	Transcript of Motion to Suppress Hearing as to Brima Wurie held on January 20, 2009, before Judge Richard G. Stearns. Court Reporter Name and Contact Information: James Gibbons at jmsgibbons@yahoo.com The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Redaction Request due 11/12/2010. Redacted Transcript Deadline set for 11/22/2010. Release of Transcript Restriction set for 1/20/2011. (Scalfani, Deborah) (Entered: 10/22/2010)
		* * * * *
6/29/11		ELECTRONIC Clerk's Notes for proceedings held before Judge Richard G. Stearns: Sentencing held on 6/29/2011 as to Brima Wurie for Brima Wurie (1), Count(s) 1, 2, 3. Defendant committed to the Bureau of Prisons for 262 months on Counts 1 and 3 and 240 months on Count 2 to be served concurrently; 5 years Supervised Release on each count to be served concurrently; $300.00 Special Assessment; No Fine; No Restitu-

DATE	DOCKET NUMBER	PROCEEDINGS
		tion. (Attorneys present: SAUSA Lundgren; FPD Gold) Court Reporter Name and Contact or digital recording information: James Gibbons at jmsgibbons@yahoo.com. (Seelye, Terri) (Entered: 06/29/2011)
6/30/11	82	Judge Richard G. Stearns: JUDGMENT as to Brima Wurie (1), Count(s) 1, 2, 3. Defendant committed to the Bureau of Prisons for 262 months on Counts 1 and 3 and 240 months on Count 2 to be served concurrently; 5 years Supervised Release, with special and mandatory conditions; $300.00 Special Assessment; No Fine; No Restitution. (Seelye, Terri) (Entered: 06/30/2011)
7/7/11	83	NOTICE OF APPEAL to Judgment 82 by Brima Wurie (Fee Status: IFP requested). NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. **Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel**

DATE	DOCKET NUMBER	PROCEEDINGS
		shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/efiling.htm. US District Court Clerk to deliver official record to Court of Appeals by 7/27/2011. (Gold, Ian) Modified on 7/11/2011 (Flaherty, Elaine). (Entered: 07/07/2011)
		* * * * *
7/8/11		USCA Case Number as to Brima Wurie 11-1792 for 83 Notice of Appeal, filed by Brima Wurie. (Ramos, Jeanette) (Entered: 07/08/2011)
		* * * * *
5/17/13	87	OPINION of USCA as to Brima Wurie re 83 Notice of Appeal. "we reverse the denial of defendant-appellant Brima Wurie's motion to suppress, vacate his conviction, and remand his case to the district court." (Paine, Matthew) (Entered: 05/20/2013)
5/17/13	88	JUDGMENT of USCA (certified copy) as to Brima Wurie re 83 Notice of Appeal. Upon consideration whereof, it is now here ordered, ad-

DATE	DOCKET NUMBER	PROCEEDINGS
		judged and decreed as follows: The district court's denial of Brima Wurie's motion to suppress is reversed, his conviction is vacated, and the matter is remanded to the district court for further proceedings consistent with the opinion issued this day. (Paine, Matthew) (Entered: 05/20/2013)
7/31/13	89	MOTION for Release from Custody as to Brima Wurie, FILED.. (Flaherty, Elaine) (Entered: 08/02/2013)
8/5/13	90	Judge Richard G. Stearns: ENDORSED ORDER entered denying 89 Motion for Release from Custody as to Brima Wurie (1). (Seelye, Terri) cm to deft Wurie 8/28/13 (Entered: 08/05/2013)
8/28/13	91	Case Appealed to Supreme Court of the United States, Case Number 13-212 as to Brima Wurie. (Danieli, Chris) (Entered: 08/29/2013)
1/29/14	92	Order entered from the U.S. Supreme Court. The Petition for a Writ of Certiorari is GRANTED as to Brima Wurie. (Paine, Matthew) (Entered: 01/30/2014)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 11-1792

UNITED STATES, APPELLEE

v.

BRIMA WURIE, DEFENDANT-APPELLANT

Entered: Aug. 30, 2013

ORDER OF COURT

Before HOWARD, STAHL AND LIPEZ,
Circuit Judges

Appellant's motion to reconsider the court's August 2, 2013 order is denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Dina Chaitowitz
Michael Dreeben
Kelly Lawrence
John Wortmann, Jr.
Ian Gold

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Docket No. 08-10071

UNITED STATES OF AMERICA

v.

BRIMA WURIE, DEFENDANT

Filed: Sept. 15, 2008

BRIMA WURIE'S AFFIDAVIT IN SUPPORT OF HIS MOTION TO SUPPRESS EVIDENCE SEIZED WITHOUT A WARRANT

I, BRIMA WURIE state the following under the pains and penalty of perjury:

1. On September 5, 2007 I was driving in Boston when I was stopped by the police.

2. Following the stop, the police arrested me and searched me.

3. The police also seized and searched the car I was driving without permission.

   I did not possess any contraband nor were there any found inside the car.

4. I neither gave my consent to search, nor did I waive any of my federal constitutional rights.

5. Upon my arrest I was taken to the police station where I was photographed, fingerprinted and interviewed regarding my personal information.

6. After the booking process, the police inventoried my personal belongings including my wallet and my cellular telephone.

7. I subsequently found out that sometime afterwards the police searched the computer files in my cellular telephone, specifically the contents of my "address and telephone numbers" file.

8. I also learned the police took my keys and conducted a search with them at the address of the baby's mother, Yolanda Walker.

9. At no time did I waive any of my constitutional rights nor did I consent to any of the seizures or searches conducted by the police in connection with this matter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 08-10071-RGS

UNITED STATES OF AMERICA

v.

BRIMA WURIE

Filed: Oct. 16, 2008

AFFIDAVIT OF SERGEANT DETECTIVE PAUL W. MURPHY, JR.

I, Paul W. Murphy, Jr., do herby under oath depose and state as follows:

1. My name is Paul W. Murphy, Jr. I am a Sergeant Detective with the Boston Police Department. I have been a police officer for twenty-two years. I am currently the supervisor of the Area C-6 Drug Control Unit that covers South Boston and parts of Dorchester.

2. On September 5, 2007, shortly before 6:45 p.m., I was driving past the L'il Peach convenience store on Dorchester Avenue. I saw a man, later identified as Fred Wade, age 51, talking on a cell phone and watching cars as they drove by the store's parking lot. After approximately five minutes, I observed a white 2007 Nissan Altima sedan pull into the parking lot and stop next to Wade. The

only occupant of the car was the driver, later identified as the defendant, Brima Wurie. Wade got into the front passenger seat and the defendant drove from the lot, turning left onto Dorchester Avenue toward D Street.

3. While I waited for additional drug unit officers to arrive, I followed directly behind the Altima on Dorchester Avenue. The defendant drove slowly for approximately one hundred and fifty yards up Dorchester Avenue, made a u-turn, and stopped in the middle of Dorchester Avenue across from the L'il Peach store. During this short ride I could see both individuals moving inside of the car. I watched Wade exit the car, cross the street and enter the store. The Altima then drove away.

4. Based on my years of training and experience, I believed that a drug transaction had taken place. The activities I witnessed were significant because a popular method of selling drugs in South Boston is by car delivery: the parties negotiate a price for the drugs over the phone, the buyer proceeds to an agreed-upon location, the drug dealer arrives in a car, and the parties quickly complete the sale in the car. While completing the sale, the parties often drive a short distance—around the block or up a section of street and back—in order to try to blend in and avoid police surveillance. I have arrested several dozens of drug dealers that have employed this method of delivery service.

5. After making these observations, I broadcast the make, model and license plate number of the defendant's vehicle to the other members of my squad. One member of the squad, Officer Boyle, arrived and went into the L'il Peach store with me. Officer Boyle and I stopped Wade

as he was leaving the store and found two plastic bags of crack cocaine in Wade's left front pocket. I believed that each bag held an "8-ball," a slang term describing 3.5 grams of crack cocaine.

6. After Wade was read his *Miranda* warnings, he said that he bought the drugs from "B," the male driving the Altima. He also said that "B" lives in South Boston and sells large amounts of crack cocaine in amounts no smaller than an "8-Ball." Wade said he had purchased cocaine several times from "B," usually in South Boston, but sometimes at "B's" father's house off of Topliff Street in Dorchester. On those occasions, Wade would go to the house and wait for "B" to drive there and sell him cocaine.

7. I contacted Officer Smigliani, who had been following the defendant in the Altima, and told him that Wade admitted buying crack cocaine from the defendant. The defendant parked his car near the intersection of Dorchester Avenue and Silver Street. After exiting the Altima, Officer Smigliani arrested the defendant for distribution of cocaine and read him his *Miranda* warnings. The car the defendant was driving was a rental car. A summary of these facts was memorialized that day in the Boston Police Incident Report 070494351, attached hereto at *Exhibit A*.

8. The defendant was taken immediately to the Area C-6 police station, located approximately one-half mile from where the defendant was arrested. At the station, as is standard procedure, the defendant was searched incident to arrest and his personal property was inventoried. Two

cell phones and $1,275.00 were recovered from the defendant. *Id.*

9. Shortly thereafter, I learned from Officers Jones and England that there was a reference in one of the defendant's cell phones to a number "617-315-7384," which was identified on the caller ID as "my house." *Id.* When Officer Jones typed that phone number into the Internet website "AnyWho" (www.anywho.com), the number came back listed to "Manny Cristal" of 315 Silver Street in Boston. *Id.*

10. I read the defendant his *Miranda* warnings a second time and asked him about his whereabouts that evening. The defendant stated that he lived at 51 Speedwell Street in Dorchester and that he was in South Boston "cruising around." He denied stopping in the L'il Peach parking lot, denied giving anyone a ride, denied speaking with anyone in South Boston that day, and denied selling cocaine.

11. I suspected, based on (1) the large amount of cash, (2) the two cell phones (often times a drug dealer uses more than one cell phone—one for arranging drug deals and another for personal use), (3) the defendant driving a rented car (drug dealers with a more lucrative business often use rental cars to prevent their personal cars from being seized should they get caught selling drugs), (4) the amount of drugs found on Wade, and (5) what Wade told me about the quantities of drugs the defendant typically sold, that the defendant may have a large quantity of drugs stored somewhere. I know from my training and experience that when a drug dealer sells relatively large amounts of drugs, he typically keeps the drugs at his res-

idence or a "stash house." When meeting with a drug buyer to make a sale, the drug dealer may only carry with him the amount of drugs he has agreed to sell to the drug buyer to (1) avoid being robbed of additional drugs or (2) being caught by the police with a significant amount of drugs.

12. I also believed that the defendant was lying about living in Dorchester. Drug dealers often take steps to cover-up where they live because, as described above, they often store their drugs and drug packaging materials there. Wade told me the defendant lived in South Boston, the defendant was parking his car at the corner of Silver Street and Dorchester Avenue in South Boston when he was arrested, and the phone number he labeled as "my house" on his cell phone was associated with 315 Silver Street in South Boston.

13. As a result, several members of the Drug Control Unit and I went to investigate that address, taking with us the key ring seized from the defendant at the time of his arrest. There, we found three mailboxes outside the building's front door. One mailbox had the names "Cristal" and "Wurie" written on it in handwritten ink. The lights in the first floor apartment were on. I was able to see a young black woman talking on the phone from the sidewalk. The woman appeared to be the same woman whose picture served as the "wallpaper" on the defendant's cell phone.

14. I took the defendant's keys and unlocked the door to the front entrance of 315 Silver Street and entered the common hallway area. There was only one apartment on the first floor to the right, and a locked door which led to

the second floor. I tried all of the keys on the defendant's key ring to open the door to the second floor, but none worked. I then tried the keys in the first floor apartment lock and found that one key unlocked the door. I removed the key from the lock without opening the door, knocked on the door, and the black female, identified as Yolanda Walker, answered.

15. I identified myself as a Boston Police officer and asked Walker to step into the hallway. I and other members of my unit could smell the distinct odor of burnt marijuana coming from the first floor apartment. Walker told us that she knew the defendant and that he occasionally stayed at the apartment, including the night before and earlier that day. Based on the smell of burnt marijuana, we suspected criminal activity within the apartment, "froze" it, and conducted a protective sweep of the apartment. We encountered a sleeping child on a bed in the apartment who appeared to be the same child depicted on the defendant's cell phone.

16. I returned to the police station and asked the defendant why his keys opened the door to the first floor apartment of 315 Silver Street. The defendant stated "I don't know."

17. We obtained a search warrant for 315 Silver Street, Apartment 1. *See* Search Warrant, Application, Affidavit, and Return, attached hereto at *Exhibit B*. Pursuant to the execution of the search warrant, among other things, officers recovered in the master bedroom:

- over 215 grams of crack cocaine;
- a Smith & Wesson .9 millimeter firearm containing five rounds of nine-millimeter ammunition;

- six rounds of .40 caliber hollow point ammunition;
- two large plastic bags, one medium-sized plastic bag, and one small plastic bag of marijuana;
- photographs and personal papers of the defendant and Walker;
- two cell phones;
- plastic bags, scissors, a scale, razor blades; and
- $250 in cash.

A summary of these facts was memorialized that day in the Boston Police Incident Report No. 070494818, attached hereto at *Exhibit C*.

18. I later learned from the Bureau of Alcohol, Tobacco, Firearms and Explosives found that the .9 millimeter firearm was stolen on April 5, 2005 from a home during a breaking and entering in Columbus, Georgia.

Signed under the pains and penalties of perjury this 15th day of October, 2008.

/s/ PAUL W. MURPHY
PAUL MURPHY

EXHIBIT C

SEARCH WARRANT G.L.c. 276, §§ 1-7	TRIAL COURT OF MASSACHUSETTS
NAME OF APPLICANT Paul W. Murphy Jr.	**Boston Municipal** **COURT DEPARTMENT** **Criminal DIVISION**
POSITION OF APPLICANT Sergeant Detective Boston Police Department Drug Control Unit/Area C6	SEARCH WARRANT DOCKET NUMBER [0703SW122]

TO THE SHERIFFS OF OUR SEVERAL COUNTIES OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR COMMONWEALTH:

Proof by affidavit, which is hereby incorporated by reference, has been made this day and I find that there is **PROBABLE CAUSE** to believe that the property described below

- ☐ has been stolen, embezzled, or obtained by false pretenses
- ☒ is intended for use or been used as a means of committing a crime.
- ☒ has been concealed to prevent a crime from being discovered.
- ☒ is unlawfully possessed or concealed for an unlawful purpose.
- ☒ is evidence of a crime or is evidence of criminal activity
- ☐ other (specify)

YOU ARE THEREFORE COMMANDED within a reasonable time and in no event later than seven days from the issuance of this search warrant to search for the following property:

Marijuana, a Class "D" controlled substance as defined under Massachusetts General Law, Chapter 94C, along with any instruments used in the packaging of marijuana for sale and/or consumption. Crack cocaine, controlled substance as defined under Massachusetts General Law, Chapter 94C, along with items used in the weighing, of cutting of, packaging of, packaging of and distribution of the drug. Further, any ledgers, books, or other items indicating illegal drug activity. Personal papers and/or effects showing occupancy and/or control of apartment #1, being the only apartment on the first floor of 315 Silver Street, South Boston, Massachusetts, currently "Frozen" by Boston Police DCU Officers.
☒ **At (identify the exact location or description of the place(s) to be searched: All rooms, closets and storage areas of, as well as all containers within, either locked or unlocked and including the basement of, apartment #1 of 315 Silver Street, South Boston, Massachusetts. 315 Silver Street, South Boston, Massachusetts. 315 Silver Street, South Boston, MA is a 3 story, cream-colored wooden house having brown shutters and a brown front door. The house bears the number #315 on its exterior. Apartment #1 of the house is the only apartment on the first floor and has a finished basement that is accessed from a stairway found within the apartment.**
Which is occupied by and/or in the possession of: Brima A. Wurie Jr., BN/M, DOB 02-22-79, SS #019-72-751, 6'0" in height, 220 lbs., black hair, brown eyes. Yolonda Walker, BN/F, DOB 5-17-78, black hair, brown eyes.
☒ **On the person or in the possession of (identify any specific person(s) to be searched: N/A**
You ☒ are ☐ are not also authorized to conduct the search at any time during the night ~~You~~ [N/A] ☐ are ☐ are not also authorized to enter the

premises without announcement. (N/A)

You ☒ are ☐ are not also commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

YOU ARE FURTHER COMMANDED if you fund such property or any part thereof, to bring it, and when appropriate, the persons in whose possession it is found before the

South Boston

Division of the Boston Municipal Court Department

DATE ISSUED	**SIGNATURE OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK**
9/5/07	x [signature illegible]
FIRST OR ADMINISTRATIVE JUSTICE WITNESS:	**PRINTED NAME OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK**
[signature illegible]	/s/ Kimberly L. Annesl

APPLICATION FOR SEARCH WARRANT G.L.C. 276, §§ 1-7	**TRIAL COURT OF** **Boston Municipal** **South Boston** **District** **MASSACHUSETTS COURT DEPARTMENT** **CRIMINAL DIVISION**
POSITION OF APPLICANT **Sergeant Detective/Boston Police Dept. Drug Control Unit/Area C6**	SEARCH WARRANT DOCKET NUMBER [07035SW122]

I, the undersigned **APPLICANT**, being duly sworn, depose and say that:

1. I have the following information based upon the attached affidavits(s), consisting of a total of 6 page(s), which is (are) incorporated herein by reference.

2. Based upon this information, there is **PROBABLE CAUSE** to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses
- ☒ is intended for use or has been used as a means of committing a crime.
- ☒ has been concealed to prevent a crime from being discovered.
- ☒ is unlawfully possessed or concealed for an unlawful purpose.
- ☒ is evidence of a crime or is evidence of criminal activity.
- ☐ other (specify)

3. I am seeking the issuance of a warrant to search for the following property (describe the property to be searched for as particularly as possible):

Marijuana, a Class "D" controlled substance as defined under Massachusetts General Law, Chapter 94C, along with any instruments used in the packaging of marijuana for sale and/or consumption. Crack cocaine, controlled substance as defined under Massachusetts General Law, Chapter 94C, along with items used in the weighing, of cutting of, packageing of and distribution of the drug. Further, any ledgers, books, or other items indicating illegal drug activity. Personal papers and/or effects showing occupancy and/or control of apartment #1, being the only apartment on the first floor of 315 Silver Street, South Boston, Massachusetts, currently "frozen" by Boston Police DCU Officers.

4. **Based upon this information, there is also probable cause to believe that the property may be found (check as many as apply):**

☒ At (identify the exact location or description of the place(s) to be searched: All rooms, closets and storage areas of, as well as all containers within, either locked or unlocked and including the basement of, apartment #1 of 315 Silver Street, South Boston, Massachusetts.

315 Silver Street, South Boston, Massachusetts. 315 Silver Street, South Boston, MA is a 3 story, cream-colored wooden house having brown shutters and a brown front door. The house bears the number #315 on its exterior. Apartment #1 of the house is the only apartment on the first floor and has a finished basement that is accessed from a stairway found within the apartment.

Which is occupied by and/or in the possession of: Brima A. Wurie Jr., BN/M, DOB 02-22-79, SS #019-72-7751, 6'0" in height, 220 lbs., black hair, brown eyes. Yolonda Walker, BN/F, DOB 5-17-78, black hair, brown eyes.

☒ **On the person or in the possession of (identify any specific person(s) to be searched): N/A**

☐ On any person present who may be found to have such property in his or her possession or under his or her control or to whom property may have been delivered.

THEREFORE, I respectfully request that the court issue a Warrant and order of seizure, authorizing the search of the above described place(s) and person(s), if any, to be searched, and directing that such property or evidence or any part thereof, if found, be seized and brought before the court, together with such other and further relief that the court may deem proper.

I ☐ have previously submitted the same application.

I ☒ have **not** previously submitted the same application.

PRINTED NAME OF APPLICANT | **SIGNED UNDER THE PENALTIES OF PERJURY**

Paul W. Murphy, Jr. | /s/ Paul W. Murphy, Jr.
Signature of Affiant

SWORN AND SUBSCRIBED TO BEFORE

[signature illegible] | [9/5/07]
Signature of Justice Clerk-Magistrate or Assistant Clerk | Date

RETURN OF OFFICER SERVING SEARCH WARRANT

A search warrant must be executed as soon as reasonably possible after its issuance, and in any case may not be validly executed more than 7 days after its issuance. The executing officer must file his or her return with the court named in the warrant within 7 days after the warrant is issued. G.L.c. 276, §3A.

This search warrant was issued on Sept. 5th 2007, and I have executed it as follows:

The following is an inventory of the property taken pursuant to this search warrant:

1. ZIP-LOCK PLASTIC BAGGIES
2. RITE WEIGHT SCALE
3. SAMSUNG CELL PHONE
4. MOTOROLA BOOST CELL PHONE
5. SCISSORS
6. PERS. PAPERS (WURIE)
7. BOX OF PLASTIC BAGGIES
8. RAZOR BLADES
9. 2 LGE. PLASTIC BAGS W/ OVER 150 GRAMS CRACK COCAINE
10. 1 P/B MARIJUANA
11. PACK OF CIGARS
12. PERS. PAPERS (WALKER)
13. LARGE FREEZER BAG OF MARIJUANA
14. MULTIPLE PLASTIC BAGGIES W/ RESIDUE
15. LGE. P/B MARIJUANA/MED. P/B MARIJUANA
16. 6 .40 CAL. HOLLOW POINT ROUNDS

17. SMITH & WESSON 9MM PISTOL MODEL #SW9VE W/HIGH CAP. MAG. W/ 5RDS 9MM AM [Illegible)
18. $250 USC
19. MAN'S BROWN SWEATSHIRT
20. PHOTOS OF WURIE
21. PERS PAPERS (WURIE & WALKER)
22. PHOTOS (WURIE & WALKER)
23. HANDWRITTEN LETTER BY WALKER

This inventory was made in the presence of: Sgt Det Paul Murphy

I swear that this inventory is a true and detailed account of all the property taken by me on this search warrant

SIGNATURE OF PERSON MAKING SEARCH	DATE AND TIME OF SEARCH	SWOR[N] AND SUBSCRIBED TO BEFORE
/s/ [signature illegible]	Sept 5th, 2007 11:00 pm	/s/ [signature illegible]
PRINTED NAME OF PERSON MAKING SEARCH	TITLE OF PERSON MAKING SEARCH	DATE SWOR[N] AND SUBSCRIBED TO
PO Christopher Boyle	[PO; BPD]	[illegible]

I, Paul W. Murphy Jr., am a Boston Police Sergeant Detective, currently assigned to the Department's Drug Control Unit (DCU), detailed to Area C6, which covers

South Boston and sections of Dorchester and Roxbury. I have been employed as a Boston Police Officer for over twenty-two years and during my career, I have affected the arrests of over four thousand individuals for various violations of the drug laws. These offenses include Trafficking in, Distribution of, Possession with the Intent to Distribute and Possession of, various controlled substances as defined under Massachusetts General Law, Chapter 94C. I hold a Bachelor of Science degree from Boston College in Marketing and a Master of Science degree in Criminal Justice from Western New England College.

I have been previously assigned as a Detective in the Drug Control Unit for approximately four years, serving in a citywide night squad and in the Area B3 squad, covering Mattapan and Dorchester. I have held the position of Sergeant Detective in the same unit for over seven years. During this period, I supervised the Area C6 DCU squad from April of 2000 to May of 2005. I then supervised the City-Wide Night Squad from May of 2005 to March of 2007. I have also been assigned in the past as a Police Officer to the Anti-Gang Violence Unit after its inception and as a Sergeant with the Youth Violence Strike Force for over three years.

I have also been the Affiant on and/or participated in the preparation of over two hundred Search Warrants which sought to search for controlled substances and/or weapons and which received the appropriate judicial/ magisterial approval.

I have made over thirty undercover purchases of varied controlled substances while working in specialized units

of the Boston Police Department. These purchases include those of cocaine, heroin, marijuana and pharmaceutical drugs.

I have attended courses and/or seminars presented on the topics of drug investigation, Search Warrants and their preparation, Confidential Informants and their use in drug investigation, undercover drug investigations, as well in designer drugs. The Drug Enforcement Administration, the Boston Police Academy, W.H. Harris Associates, the Federal Bureau of Investigation and the New England Narcotic Officers Association presented these courses respectively.

I have been judicially accepted as a law enforcement expert in the area of street level drug investigation and have been allowed to offer opinions in various Suffolk County Courts relative to the sale and/or the distribution of, manufacture of and the consumption of, various narcotics. The date of the writing of this affidavit in support of application for a Search Warrant is **September 05, 2007.**

One of the more popular methods by which drugs are currently sold in the South Boston area, as well as in other sections of Boston, is by motor vehicle delivery. What generally occurs in this type of transaction is that a drug customer will contact the drug dealer by phone—usually cell phone.

The amount of drugs to be purchased, as well as the place where the transaction will transpire is then decided upon and the buyer will proceed to the agreed upon location. The buyer will usually wait, either within a motor vehicle or on foot, for the dealer to arrive.

Drug investigators take note of people waiting in high drug areas, watching passing cars and/or making brief phone calls. When the dealer arrives, the transaction will then transpire, usually within a motor vehicle and the parties will separate.

Oftentimes, the drug buyer will enter the dealer's car and go for what the Police sometimes refer to as a "meaningless ride", referring to a ride around the block or up the street and back, etc.

The Andrew Square section of South Boston is a location routinely patrolled by Area C6 DCU Officers. There are places of business in the area, payphones, as well as a large MBTA station. DCU Officers have come to learn that drug buyers and dealers meet in this area in attempt at blending in with the general law abiding public, to avoid surveillance.

Officers from my DCU squad have apprehended hundreds of individuals in this area over the years for drug violations. Many of these incidents have involved the motor vehicle delivery and/or conveyance of controlled substances.

On today's date (September 05, 2007), at about 6:45 p.m., I was traveling in the Andrew Square area, dressed in plainclothes and operating an unmarked Drug Control Unit vehicle. I observed a black male standing in the Lil' Peach variety store parking lot, which is in Andrew Square, opposite the aforementioned Andrew Square MBTA station. This male was later identified as Fred A. Wade Jr., PN/M, DOB 09-01-56, of 28 Dyer Street, #1, Dorchester, MA.

Mr. Wade was using a cell phone and watching passing motor vehicles. I began to monitor his activities and summonsed other squad members to the area to assist me. About five to eight minutes later, a white color 2007 Nissan Altima sedan, bearing Massachusetts registration #93J F88, pulled into the Lil' Peach parking lot and stopped beside Mr. Wade.

This vehicle was solely occupied and thus operated by a black male who was later Identified as Brima A. Wurie Jr., BN/M, DOB 02-22-79, who provided an address of 51 Speedwell Street #2, Dorchester, MA. Mr. Wade entered the front passenger seat of the Altima and Wurie drove from the lot, turning right onto Dorchester Avenue, towards D Street.

Other squad members were still enroute to the Andrew Square area, so I followed directly behind the Altima as it proceeded on Dorchester Avenue. I could see that both Wade and Wurie were at times turned toward each other within the car and I could see Wade slightly lift himself up off the seat as if accessing a pants pocket.

Wurie drove the car at a slow rate of speed and at one point signaled left and began a U-turn. He then shut the directional off and proceeded another thirty yards or so, signaled left and then U-turned. Wurie proceeded back in the direction in which he had traveled and stopped in the middle of Dorchester Avenue, prior to the Lil' Peach store and allowed Wade to exit the vehicle. Essentially Wurie drove Wade about 150 yards on Dorchester Avenue, U-turned and dropped him off.

At this time I believed that a drug transaction had just transpired within the Altima as I have made dozens of

drug arrests in the past involving persons who have engaged in similar behavior as the aforementioned suspects. I watched Wade walk back to the Lil' Peach store and enter it. I also watched the Altima as it was stopped at the red light on Dorchester Avenue at Southampton Street and broadcast its description, including the license plate number, to other members of the squad.

PO's Steven Smigliani and Christopher Boyle, who are Area C6 DCU Officers, now arrived in Andrew Square. PO Boyle exited his unmarked DCU vehicle and accompanied me into the Lil' Peach store, while PO Smigliani followed the Altima as it drove on Dorchester Street, further into South Boston, towards Perkins Square.

PO Boyle and I encountered Mr. Wade as he was walking out of the variety store and identified ourselves to him by displaying our badges and stating "Boston Police". At this time, I recovered two plastic bags, believed to be "8-balls" of crack cocaine from Wade's left front pants pocket. An "8-ball" is street slang for 3.5 grams of the drug.

Wade was initially uncooperative, but then stated that he had bought the bags of cocaine from "B", who was the male driving the Altima. I conveyed this information to PO Smigliani via walkie-talkie and I requested that PO Smigliani arrest the driver of the Altima.

PO Smigliani summonsed marked Area C6 units to assist him in stopping the Altima, as DCU vehicles are generally not equipped with Police issued emergency equipment. PO Smigliani observed Wurie drive the Altima on Dorchester Street, then U-turn and park near Silver Street.

PO Smigliani, who was operating a gray Chevy pick-up truck, parked near him and watched Wurie exit the Altima. PO Smigliani exited his DCU vehicle and Wurie, who was watching the Officer, asked if it was all right to park there. PO Smigliani, like all DCU Officers, was dressed in plainclothes.

Other Area C6 Officers arrived at this location and PO Smigliani Mirandized Wurie on scene, arrested him and informed him of his charges. The Altima was found to have been rented by Brima Wurie, from the Enterprise Rent a Car Company of Boston, Inc.

As this was transpiring, I Mirandized Mr. Wade at the scene of his arrest and he indicated that he understood his rights. He informed PO Boyle and I that "B", the man that had just sold him the cocaine, sells large amounts of cocaine and lives in South Boston. He detailed that the smallest amount of crack cocaine that "B" will sell is an "8-ball" of the drug.

He stated that he has bought cocaine from "B" several times in the past and usually meets him in South Boston as he lives in the area. Wade stated that "B"'s father lives in Dorchester on a street that is off of Topliff Street and that sometimes he (Wade) will go to this house and wait for "B" to drive there and sell him cocaine. Wade stated that "B"'s father is also a drug dealer.

Investigation of Brima Wurie's criminal record with the Commonwealth of Massachusetts Criminal History Systems Board shows that he has been convicted in the past of the following offenses, listed along with the Court having jurisdiction: Suffolk Superior Court-Accessory After the Fact/Assault by Means of a Dangerous Weapon, Op-

erating without a License, Operating to Endanger, Leaving the Scene/Personal Injury and A & B D/W; Brockton District Court-A & B/PO, Resisting Arrest; Dorchester District Court-Unarmed Assault with Intent to Rob; Dorchester District Court-A & B D/W, A & B; Dorchester District Court-Intimidation of a Witness, A & B; Dorchester District Court-A & B D/W (knife), Assault by Means of a Dangerous Weapon.

I then went to Area C6 and again Mirandized him. He then stated that he understood his Rights and I asked him about his recent activities and why he was in South Boston this date.

Wurie stated to me that he lives at 51 Speedwell Street in Dorchester and that he was in South Boston as he was "just cruising around." He denied having stopped in the Lil' Peach parking lot, denied having let someone into his car and give him a short car ride, denied speaking with anyone in South Boston and denied having sold cocaine to the man that was in his car.

Wurie was charged with the crimes of Distribution Class "B" and Distribution Class "B" (School Zone). Seized from him at booking was $1275.00 USC and two cell phones.

PO Boyle searched the Altima incidental to arrest and did not recover any other drugs. PO Kevin Jones, who is also a member of the squad, searched Wurie's cell phones incidental to his arrest. Located within Brima's gray Verizon LG cell phone was the phone number of #617-315-7384 that was listed under the heading of "My house". There is a photo of a young black female holding a baby as wallpaper on the screen of this phone.

PO Jones then did a reverse phone listing using the Internet AnyWho web page of this phone number. It was learned that the number is listed to Manny Cristal of 315 Silver Street in South Boston.

I then took the key ring that Wurie had in his possession that contained the Altima key, as well as several other keys and drove to Silver Street in the company of squad members Robert England, Kevin Jones and Steven Smigliani. I approached 315 Silver Street alone and observed that there are three mailboxes affixed to this house. The farthest mailbox away from the single front door of the house is marked with the names Cristal and Wurie in handwritten ink.

The first floor was illuminated and a black female, believed to be the same woman in the aforementioned cell phone photo, could be seen speaking on a phone within the house. This view is easily scene by standing on the sidewalk in front of the house.

I used a key from Wurie's ring to unlock and open the front entrance of 315 Sliver Street. I then entered the building and encountered the door to the first floor apartment on my right and a second locked door straight ahead that leads to the second floor.

I first tried all of Wurie's keys in the lock of the door leading to the second floor and they did not work in the lock. I then tried the same keys in the first floor apartment door and found one that unlocked the door.

Rather that enter this apartment, I knocked on the door and the black female that was within answered it. I iden-

tified myself as a Boston Police Officer, as did the other members of my squad and displayed my badge to her.

We did not enter the apartment, but instead asked this female, later identified as Yolonda Walker, to step out into the entryway. All of the Officers present, including myself, could detect the odor of freshly burnt marijuana within the first floor apartment.

Burning or burnt marijuana has a distinctive odor unto itself that is easily recognized. It is hard to describe this odor, just as it is difficult to describe the taste of milk, as they are both distinctive and not similar to anything else.

I told her that a man had just been arrested for selling drugs and had in his possession the keys to the front door of this house, as well as to her apartment. I told her the man's name and she stated that she knows him and that he stays there sometimes. She also stated that he had stayed there last night and had been there earlier today. She seemed nervous and somewhat reluctant to answer questions, leading me to believe that she was not being fully truthful with me.

Squad members and I then conducted a protective sweep of this first floor apartment and encountered a sleeping infant on a bed. This child is thought to be the one in the cell phone photo, I then returned to Area C6 and asked Brima Wurie why the keys on his ring opened apartment #1 of 315 Silver Street and he stated, "I don't know". This apartment is currently "frozen" by Boston Police DCU Officers, pending the Court's permission to search it for marijuana and crack cocaine.

It is my opinion, after having arrested hundreds of individuals in the past for drug distribution, that Brima Wurie is presently selling crack cocaine and that he uses cell phones to stay in contact with drug customers and motor vehicles, in this case a rental vehicle, to bring the drug to buyers.

Drug dealers most often take steps to hide their true address from authorities as they often store drugs for sale where they live and/or additional evidence of drug distribution, such as money derived from drug sales, drug packaging paraphernalia and at times written notations indicating drug activity.

It is my belief, based upon Mr. Wade's statements about Wurie, the cell phone containing Yolonda Walker's picture and the phone number to 315 Silver Street, apt. #1, South Boston under the heading "My house" that was in Wurie's possession, along with the keys that he had in his possession at the time of his arrest that opened this apartment, that Brima Wurle currently resides in apartment #1 of 315 Silver Street, South Boston, with his girlfriend Yolanda Walker and the baby.

It is my belief that marijuana will be found within this apartment, as it strongly smells of the drug. Further, I believe that additional evidence of Wurie's illegal drug business will be found here as he is denying any connection to this address.

I am requesting that the Court grant a Search Warrant for this apartment, allowing Police to search the apartment for marijuana, additional crack cocaine and any items connected with crack cocaine distribution, including items used for weighing, cutting and packaging the

drug, money derived from drug sales, books, notes or ledgers denoting drug activity and personal effects showing occupancy and/or control of 315 Sliver Street, apartment #1, South Boston.

315 Silver Street, South Boston, MA is a 3 story, cream-colored wooden house having brown shutters and a brown front door. The house bears the number #315 on its exterior. Apartment #1 of the house is the only apartment on the first floor and has a finished basement that is accessed from a stairway found within the apartment.

PRINTED NAME OF AFFIANT	**SIGNED UNDER THE PENALTIES OF PERJURY**
/s/ Paul W. Murphy Jr.	/s/ PAUL W. MURPHY JR.
DATE	**SWORN AND SUBSCRIBED BE FORE:**
[9/5/07]	/s/ [signature illegible] Ass't Clerk Magistrate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 08-10071-RGS

UNITED STATES OF AMERICA

v.

BRIMA WURIE

Filed: Oct. 16, 2008

AFFIDAVIT OF POLICE OFFICER ROBERT ENGLAND

I, Robert England, do herby under oath depose and state as follows:

1. My name is Robert England. I am a police officer with the Boston Police Department. I am currently a member of the Area C-6 Drug Control Unit that is assigned to cover South Boston and parts of Dorchester.

2. On September 5, 2007, at approximately 6:45 p.m, I was driving around South Boston as part of our unit's nightly routine looking for drug activity.

3. I became aware that based on observations made by Sgt. Det. Paul Murphy, the defendant, Brima Wurie, was arrested for the distribution of crack cocaine.

4. The defendant was taken immediately to the Area C-6 police station, located approximately one-half mile from where he was arrested at the intersection of Silver Street and Dorchester Avenue. At the station, as is standard procedure, the defendant was searched incident to arrest and his personal property was inventoried. Two cell phones and $1,275.00 were recovered from the defendant.

5. Approximately 5-10 minutes after arriving at the station, and prior to being booked, Officers Kevin Jones and I noticed that one of the cell phones recovered from the defendant was repeatedly receiving calls from a number identified on the external the caller ID screen on the front of the phone as "my house." We were able to see this in plain view without opening the phone.

6. About 5 minutes after it began ringing, we opened the phone to look at the phone's call log. We found a photo of a young black female holding a baby as the phone's "wallpaper." By pressing one button we accessed the phone's call log showing the calls from "my house." From there, by pressing one button, we were able to determine that the "my house" caller ID reference had the phone number "617-315-7384."

7. Officer Jones typed that phone number into the Internet website "AnyWho" (www.anywho.com). The number came back listed to "Manny Cristal" of 315 Silver Street in Boston—the same street near which the defendant was parking when arrested.

8. We did not search the phone's "contacts" or access any other information contained within the defendant's phone.

Signed under the pains and penalties of perjury this 15th day of Oct., 2008.

/s/ ROBERT ENGLAND
ROBERT ENGLAND

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal Action No. 08-10071-RGS

UNITED STATES OF AMERICA

v.

BRIMA WURIE

Feb. 23, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR THE PLAINTIFF:

UNITED STATES ATTORNEY'S OFFICE
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Boston, Massachusetts 02210
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* * * * *

[48]

Q When you got to the booking area at seven o'clock, what was going on?

A There was a person—the booking process was beginning. There were several of my squad members with that person behind the booking glass.

Q Could you describe the booking area and what goes on there?

A The booking area of C-6 is—if you're standing on one side, there's where the booking officer stands. There's a computer there, a counter area, a couple of landline phones.

On the other side there's a large plexiglass window, and on the other side of that is where the person arrested will stand with the police, with the arresting officers, and the process will be made, like photographs, fingerprints, biographical knowledge.

Q When you got to the booking area that night sometime around seven o'clock, was there a specific individual being booked?

A Yes.

Q Do you see him in the courtroom today?

A I do.

Q Could you point him out and describe what he's wearing.

A He's seated—he's now standing wearing a brown-colored suit jacket and tie.

Q Had you even seen that man before, as far as you know?

[49]

A No.

Q Did you learn his name?

A I did.

Q Were you familiar with his name prior to that date?

A No, not particularly

Q Now, when you got to the booking area and Mr. Wurie was being booked, what exactly did you do?

A I walked to the booking area, and I noticed there were two cell phones on the counter of that—of the booking area.

MR. WORTMAN: You honor, may I approach, please?

THE COURT: You may.

Q Officer Jones, I'm going to show you what's been marked as Exhibit 27 and ask you to take a look at that and tell me whether you recognize it.

A Yes.

Q Are those the two phones that were on the corner of the booking desk?

A Yes.

MR. WORMANN: Your Honor, I would offer these as Exhibit 27.

THE COURT: Twenty-seven.

(Government's Exhibit No. 27 received in evidence.)

BY MR. WORTMANN

Q What I'm going to do if I could, is put these two [50] phones on the camera for us all to take a look at.

While at the booking desk, did you notice anything unusual about the phone?

A The phone, as you're looking on the screen on the left side, the one that's not open, the LG phone—

Q That would be the one I just pointed to?

A Yes.

—that was continuously ringing.

Q Could you see anything on the screen of the phone?

A Yes.

Q What did you see?

A I'm not sure if it was on the front screen. This type of phone you can also open, almost like a book.

Q (Demonstrating.)

A Yes.

I'm not sure if it was on the front screen or this screen as you opened it, but there were several missed calls, and one of the entries of the missed calls read "my house."

Q When you opened up the phone, are you familiar with the term "wallpaper" on a phone?

A I am.

Q What is that?

A Essentially wallpaper is a corresponding picture that anyone can put on with a certain entry of the phone.

[51]

Q Was there a picture on that phone when you opened it up?

A Yes.

Q Do you recall what the picture was of?

A It was a younger black female holding a baby.

Q Did you meet that woman later on?

A Yes.

Q What did you learn her name to be?

A Yolanda Walker.

Q Did you see that baby later on?

A I did.

Q Now, once you opened the phone and saw the "my home" or "my house" number, did you do some further investigation with the phone?

A I did.

Q Tell us what you did, sir?

A I was able to retrieve the number that was associated with that entry, and I was able to do what we call a "reverse lookup" on this number. And a reverse

lookup is, essentially, I went on the Internet to a website called AnyWho.com, and if you have a phone number, you can enter it; and provided that number is a listed phone number, you can get the corresponding name and address associate with that number.

A Why was that of interest to you, sir?

A We wanted to investigate this matter further.
* * *

* * * * *

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 13-212

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BRIMA WURIE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police, without obtaining a warrant, to review the call log of a cell phone found on a person who has been lawfully arrested.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 728 F.3d 1. The opinion of the district court (Pet. App. 54a-69a) is reported at 612 F. Supp. 2d 104.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2013. A petition for rehearing was denied on July 29, 2013 (Pet. App. 70a-73a). The petition for a writ of certiorari was filed on August 15, 2013. The petition was granted on January 17, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, respondent was found guilty of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g); distributing crack cocaine, in violation of 21 U.S.C. 841(a); and possessing crack cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a). Pet. App. 4a. He was sentenced to 262 months in prison. *Ibid.* The court of appeals vacated his convictions on two of the counts on the ground that evidence had been admitted at trial in violation of the Fourth Amendment and remanded for resentencing on the remaining count. See *id.* at 1a-31a, 52a-53a.

1. Over the last 25 years, cell phones have become ubiquitous in American life. Over 90% of American adults now own a cell phone. See Pew Research Ctr., *Smartphone Ownership—2013 Update* 2 (June 5, 2013).[1] Cell phones typically come equipped with a variety of capabilities. Older models include voice

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[1] http://pewinternet.org/files/old-media/Files/Reports/2013/PIP_Smartphone_adoption_2013_PDF.pdf.

calling, call-history logs, text messages, and basic cameras. Newer "smartphones," such as Apple's iPhone, have a variety of additional features, such as Internet browsers, video recording and playback, and navigation tools. They also offer users the option of downloading applications developed by third parties. Those applications include games, social-networking platforms like Facebook and Twitter, and music-distribution programs.

The same features of cell phones that have made them popular among ordinary citizens—their versatility and portability—have also made them pervasive instrumentalities of crime. It is now common for drug deals to be arranged by cell phone, for violent street gangs to communicate through text messages, and for child abuse to be recorded on camera phones. The majority of judicially authorized telephone wiretaps, for example, now involve cell phones. See Administrative Office of the U.S. Courts, *Wiretap Report 2012*.[2] Drug traffickers and terrorist organizations often use so-called "burner" phones—cheap phones with prepaid service plans intended to be discarded after a brief period of time—to avoid detection by law-enforcement officials. See, *e.g.*, *United States* v. *Portalla*, 496 F.3d 23, 26-28 (1st Cir. 2007). Cell phones also present special challenges for law-enforcement officers, because their contents can quickly be concealed behind sophisticated encryption walls, or destroyed entirely by individuals who do not have physical access to the phone, a process known as "remote wiping." See pp. 34-40, *infra*.

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[2] www.uscourts.gov/Statistics/WiretapReports/wiretap-report-2012.aspx#sa1 (last visited Feb. 28, 2014).

2. On September 5, 2007, a Boston police officer noticed respondent make an apparent drug sale out of his car that the officer believed to have been arranged by cell phone. Pet. App. 2a, 56a-57a & n.3. After the transaction, the officer confronted the buyer and found two bags of crack cocaine in his pocket. *Id.* at 2a. The buyer told the officer that he had purchased the drugs from "B," the driver of the car, who was a crack dealer living in South Boston. *Ibid.* Officers following respondent then arrested him for drug distribution, read him the *Miranda* warnings, and drove him to a nearby police station, where they seized two cell phones, a set of keys, and more than one thousand dollars in cash from his person. *Id.* at 2a, 57a.

Five to ten minutes after respondent arrived at the station, officers noticed that one of respondent's cell phones, a "flip" phone that a user must open to make calls, was repeatedly receiving calls from a number identified as "my house" on the phone's external screen. Pet. App. 2a, 57a-58a. Minutes later, the officers opened the phone to check its call log. *Id.* at 2a-3a. They saw a photo of a woman holding a baby set as the internal screen's "wallpaper." *Id.* at 3a. The officers pressed one button to navigate to the phone's call log, then pressed another button to obtain the number for "my house." *Ibid.* They did not view any other information stored on the phone.

The officers typed the number for "my house" into an online directory and learned that it was associated with an address on Silver Street in South Boston near where respondent had parked his car before his arrest. Pet. App. 3a. After giving a second set of *Miranda* warnings, the officers then further questioned respondent, who denied his participation in the drug

deal and claimed to reside in Dorchester, not South Boston. *Ibid.* Given the amount of cash respondent had been carrying and his possession of two cell phones (a practice known to the police to be common among drug dealers), the officers suspected that respondent kept a "hidden mother cache" of crack cocaine at an address other than the one he had identified during questioning. *Id.* at 58a-59a & n.6.

Accordingly, the officers drove to the Silver Street address, an apartment building, where they found a mailbox labeled with respondent's name and observed through the window of a first-floor apartment a person who closely resembled the woman in the wallpaper on respondent's phone. Pet. App. 3a-4a. The officers then obtained and executed a search warrant for the Silver Street apartment. *Id.* at 4a. They ultimately seized crack cocaine, marijuana, cash, a firearm, and ammunition from inside. *Ibid.*

3. Respondent was charged with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g) (Count 1); distributing crack cocaine, in violation of 21 U.S.C. 841(a) (Count 2); and possessing crack cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a) (Count 3). Pet. App. 4a. He moved to suppress the evidence obtained from the search of the apartment, arguing that it was the fruit of the unconstitutional warrantless search of his cell phone's call log. See *ibid.*

The district court denied respondent's motion. See Pet. App. 63a-69a. The court explained that under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, the police may conduct "[a] full search of the person [of an arrestee], his effects, and the area within his immediate reach

* * * without regard to any exigency or the seriousness of the offense, and regardless of any probability that the search will yield a weapon or evidence of the crime for which the person is arrested." *Id.* at 62a (citing *United States* v. *Robinson*, 414 U.S. 218, 236 (1973)). Further, it stated, the police may conduct the search "when the accused arrives at the place of detention." *Ibid.* (quoting *United States* v. *Edwards*, 415 U.S. 800, 803 (1974)). The court then explained that "[t]he search of [respondent's] cell phone incident to his arrest was limited and reasonable." *Id.* at 66a. The court found that "[t]he officers, having seen the 'my house' notation on [respondent's] caller identification screen, reasonably believed that the stored phone number would lead them to the location of [respondent's] suspected drug stash." *Ibid.*

A jury convicted respondent on all three counts. See Pet. App. 4a. The district court sentenced him to concurrent terms of 262 months on Counts 1 and 3 and 240 months on Count 2. See *ibid.*; 08-10071 Docket entry No. 82, at 2 (June 30, 2011).

4. A divided panel of the court of appeals reversed the district court's denial of respondent's suppression motion and vacated his convictions on Counts 1 and 3. See Pet. App. 1a-53a. In so doing, the court fashioned what it described as a "bright-line rule" that "the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person" in any circumstances. *Id.* at 13a, 27a-28a. The court of appeals acknowledged that that this Court has set forth a "straightforward rule, easily applied, and predictably enforced," that items found on an arrestee may be searched incident to a lawful arrest and has emphasized that the rule is

designed to avoid case-by-case determinations of whether a particular search incident to arrest was lawful. *Id.* at 13a-15a, 25a (citation omitted). But the court nevertheless concluded that this Court's decisions did not foreclose treating cell phones "as a category" differently from other containers. *Id.* at 15a. It found support for such an item-specific exception to the search-incident-to-arrest doctrine in this Court's decisions holding that the police do not have authority to search areas outside of the immediate control of the arrestee. See *ibid.* (citing *United States* v. *Chadwick*, 433 U.S. 1 (1977), abrogated on other grounds by *California* v. *Acevedo*, 500 U.S. 565 (1991); *Arizona* v. *Gant*, 556 U.S. 332 (2009)).

The court of appeals accordingly undertook an inquiry into whether "the warrantless search of data within a cell phone can ever be justified" by law-enforcement interests, in particular the preservation of evidence. Pet. App. 21a. It rejected the government's argument that the search of a cell phone is necessary to prevent the destruction of the data stored on the phone through remote wiping. See *id.* at 23a. The court believed that it is "not * * * particularly difficult" for police to prevent that tactic by turning the phone off, removing its battery, placing it in a "Faraday enclosure" (a container that blocks the cell phone from receiving wireless signals), or blindly copying its contents. See *id.* at 23a-24a. The court therefore concluded that the government's concern that evidence on a cell phone could quickly be destroyed was merely "theoretical" and thus insufficient to satisfy the Fourth Amendment when "[w]eighed against the significant privacy implications inherent in cell phone data searches." *Id.* at 24a.

Judge Howard dissented, explaining that "this case requires us to apply a familiar legal standard to a new form of technology." Pet. App. 31a. This Court's decisions, he wrote, "establish that items immediately associated with the arrestee—as a category—may be searched without any * * * justification" related to evidence preservation or officer safety. *Id.* at 43a. Judge Howard recognized concerns "about the privacy interests at stake in cell phone searches" given the amount of personal information that a modern phone can store. *Id.* at 47a. But rather than addressing those concerns through a blanket prohibition on cell-phone searches, he would have evaluated such searches under the Fourth Amendment's basic reasonableness standard. *Id.* at 47a-48a. He ultimately determined, however, that the question of what constitutes an "unreasonable cell phone search should be left for another day," because the limited search here was clearly reasonable. *Id.* at 50a.

SUMMARY OF ARGUMENT

The search of the call log of respondent's cell phone incident to his arrest complied with the Fourth Amendment.

A. The warrantless search, incident to arrest, of a cell phone found on an arrestee's person is constitutionally reasonable.

1. This Court's decisions have steadfastly acknowledged "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Weeks* v. *United States*, 232 U.S. 383, 392 (1914). Under that authority, an officer may conduct a

full evidentiary search of the person of an arrestee and any items found on his person without a warrant. This Court has also recognized a distinct authority to search the area in the immediate vicinity of the arrest, but has limited that authority to the area necessary to serve the more focused law-enforcement interests in preventing the concealment or destruction of evidence and removing weapons. See *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

In *United States* v. *Robinson*, 414 U.S. 218 (1973), this Court confirmed that the narrower interests identified in *Chimel* do not circumscribe officers' "traditional and unqualified authority" to search items found on the person of the arrestee. *Id.* at 229. That is because the historical authority to search items on an arrestee's person rests primarily on the "reduced expectations of privacy caused by the arrest." *United States* v. *Chadwick*, 433 U.S. 1, 16 n.10 (1977). The traditional rule also comports with the realities of police work, in which officers cannot reasonably be expected to undertake an item-by-item legal analysis during arrests. *Robinson*, 414 U.S. at 235. A warrantless search of a cell phone found on the person of the arrestee, like the search of any other such item, is thus "a 'reasonable' search under [the Fourth] Amendment." *Ibid.*

2. Even if it were appropriate to create item-by-item exceptions to officers' authority to search an arrestee, no sound justification exists to exclude cell phones from the general rule. In today's world, cell phones are particularly likely to contain evidence of unlawful activity and to help law-enforcement officers identify suspects they have apprehended. And unlike other containers, their contents can be destroyed or

concealed after the suspect is taken into custody, making it impossible or impracticable for the police ever to retrieve critical evidence. Searches of cell phones at the scene of arrest, moreover, can quickly alert officers that confederates or others are coming to the scene, helping them avoid potentially dangerous encounters. Although cell phones can contain a great deal of personal information, so can many other items that officers have long had authority to search, and the search of a cell phone is no more intrusive than other actions that the police may take once a person has been lawfully arrested.

3. The search-incident-to-arrest doctrine intrinsically limits a warrantless search of a cell phone to those files stored on the phone. The doctrine does not permit officers to use the phone's Internet connection to access files stored elsewhere.

B. Even if the court of appeals were correct in distinguishing cell phones categorically from other objects seized from an arrestee's person, the court erred in imposing a blanket prohibition on searches of cell phones incident to arrest.

1. The court of appeals believed that cell-phone searches do not sufficiently implicate the *Chimel* justifications to be categorically authorized. But even if that were so, it would not mean that a lawful arrest *never* justifies the search of a cell phone. Rather, as this Court has held for searches of automobiles that are no longer within the reaching distance of an arrestee, officers would still be permitted to conduct a warrantless search of a cell phone incident to arrest "when it is reasonable to believe that evidence of the offense of arrest might be found" on the phone. *Arizona* v. *Gant*, 556 U.S. 332, 335 (2009). That rule

would be administrable and would preserve officers' historical authority to conduct a search incident to arrest to "gather[] evidence related to the crime of arrest." *Thornton* v. *United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring in the judgment). It would also dispel any theoretical concern that officers will use arrests for traffic offenses as pretexts to search cell phones.

2. The court of appeals also believed that the large storage capacity of cell phones and the frequent presence of personal information on them raise heightened privacy concerns. See Pet. App. 16a-19a. But even if a cell phone were thought materially distinguishable from other objects that officers have long enjoyed authority to search incident to arrest, such as diaries, address books, briefcases, and purses, it would not justify excluding them from officers' search authority entirely—handicapping officers' investigative power whenever lawbreakers use sophisticated technology rather than pen and paper. Instead, courts should apply the Fourth Amendment's basic reasonableness standard to ensure that the *scope* of any cell-phone search does not extend beyond what is reasonably necessary to serve legitimate law-enforcement interests.

Under that standard, a cell-phone search incident to arrest would be lawful if the officer has an objectively reasonable basis to believe that each area of the phone she searches contains information related to a legitimate law-enforcement interest, such as finding evidence of the crime of arrest, identifying the suspect, or protecting officers' safety. In addition, officers would retain plenary authority to search any area of a cell phone containing information in which an in-

dividual lacks a reasonable expectation of privacy, such as a call log.

C. Under any of the rationales discussed above, the search of respondent's call log was constitutional. *Robinson* alone justifies the search. But so would narrower rationales: the search sought to determine respondent's home address and it was directed only at the phone's call log. It was therefore justified to uncover evidence of the crime of arrest and to identify him, and it was reasonable in scope.

ARGUMENT

THE SEARCH OF THE CALL LOG OF RESPONDENT'S CELL PHONE COMPLIED WITH THE FOURTH AMENDMENT

A. The Warrantless Search Of A Cell Phone Seized From The Person Of An Arrestee Is Constitutional

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This Court has explained that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, * * * reasonableness generally requires the obtaining of a judicial warrant." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 653 (1995) (*Vernonia*). But "a warrantless search of the person is reasonable * * * if it falls within a recognized exception" to the warrant requirement. *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1558 (2013).

The search of respondent's cell phone fell within a long-established exception to the warrant requirement: the "unqualified authority" of law-enforcement officers "to search the person of [an] arrestee," includ-

ing any items found on his person. *United States* v. *Robinson*, 414 U.S. 218, 225 (1973). That exception to the warrant requirement "appl[ies] categorically and thus do[es] not require an assessment of whether the policy justifications underlying the exception * * * are implicated in a particular case." *McNeely*, 133 S. Ct. at 1559 n.3. Rather, any warrantless search of items found on the person of an arrestee is "a 'reasonable' search." *Robinson*, 414 U.S. at 235. Under that settled doctrine, the search of respondent's cell phone was constitutional.

1. Officers have authority to search any item found on the person of an arrestee without a warrant

a. This Court's decisions have recognized "two distinct" search authorities arising out of an arrest situation: (i) the full authority to search the person of an arrestee, including any items found on the person; and (ii) a circumscribed authority to search the area around the arrestee. *Robinson*, 414 U.S. at 224. The former derives primarily from a person's reduced expectations of privacy once he has been lawfully arrested, while the latter derives from the specific law-enforcement interests in preventing the destruction of evidence and protecting the safety of officers.

With respect to the first authority, this Court has long confirmed "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Weeks* v. *United States*, 232 U.S. 383, 392 (1914); see *Carroll* v. *United States*, 267 U.S. 132, 158 (1925); *Agnello* v. *United States*, 269 U.S. 20, 30 (1925). The condition precedent to that search author-

ity is that the arrest is lawful under the Fourth Amendment—either because the arrest is authorized by a warrant or because the arrest itself satisfies one of the recognized exceptions to the warrant requirement.

That settled view comports with the original understanding of the Fourth Amendment. As this Court has explained, "searches incident to warrantless arrests * * * were * * * taken for granted at the founding." *Virginia* v. *Moore*, 553 U.S. 164, 170 (2008) (internal quotation marks and citation omitted). In the American colonies, "[a]nyone arrested could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, at 420, 751 (2009). The authority of officers to conduct a full search of the person incident to arrest was the "one exception" to the warrant requirement that was "established as firmly as the rule [against unreasonable searches and seizures] itself." *People* v. *Chiagles*, 142 N.E. 583, 583 (N.Y. 1923) (Cardozo, J.) (citing *Entick* v. *Carrington*, 95 Eng. Rep. 807 (K.B. 1765)); see *Robinson*, 414 U.S. at 232-233; Francis Wharton, *A Treatise on Criminal Pleading and Practice* § 60, at 45 (8th ed. 1880); 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 211, at 127 (2d ed. 1872).

The traditional authority of officers to conduct a full search of the person of an arrestee reflected a judgment that when a person has been lawfully arrested, the law-enforcement interest in investigating, preventing, and punishing crime outweighs "the diminished expectations of privacy of the arrestee."

Maryland v. *King*, 133 S. Ct. 1958, 1979 (2013). As then-Associate Judge Cardozo explained after canvassing the history of the doctrine, "[t]he basic principle" is that a "[s]earch of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion." *Chiagles*, 142 N.E. at 584.

It was understood, moreover, that the principal law-enforcement interest promoted by search-incident-to-arrest authority was the general interest in "gathering evidence relevant to the crime for which the suspect had been arrested." *Thornton* v. *United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring in the judgment). In describing officers' search authority, courts and treatises most frequently cited the police's interest in "search[ing] th[e] person for evidences of his guilt." *Woolfolk* v. *State*, 8 S.E. 724, 728 (Ga. 1889).[3] Courts also observed that evidence found on the body of a person incident to arrest would often constitute a "means of identifying the criminal." *Holker* v. *Hennessey*, 42 S.W. 1090, 1093 (Mo. 1897).[4]

In addition to officers' authority to conduct a full search of the arrestee's person, this Court has also recognized that the police have authority to search the

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[3] See *Kneeland* v. *Connally*, 70 Ga. 424, 425 (1883); *Thatcher* v. *Weeks*, 11 A. 599, 599 (Me. 1887); *Reifsnyder* v. *Lee*, 44 Iowa 101, 103 (1876); *Ex parte Hurn*, 9 So. 515, 519 (Ala. 1891); *Getchell* v. *Page*, 69 A. 624, 626 (Me. 1908); *State ex rel. Murphy* v. *Brown*, 145 P. 69, 71 (Wash. 1914).

[4] See *Reifsnyder*, 44 Iowa at 103; see also 1 Francis Wharton, *A Treatise on Criminal Procedure* § 97, at 136-137 (James M. Kerr ed., 10th ed. 1918).

area within the "immediate control" of the arrestee. But for many years, that authority, though "conceded in principle, [was] subject to differing interpretations as to the extent of the area which may be searched." *Robinson*, 414 U.S. at 224. In some decisions, this Court held unconstitutional full searches of the premises where a person was arrested. See, *e.g.*, *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 356-358 (1931). In *Harris* v. *United States*, 331 U.S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), however, this Court held that officers were permitted to search the premises of arrest without a warrant, so long as the search was reasonable in scope in light of the "particular circumstances of the particular case," *Harris*, 331 U.S. at 148, 152-153, and was not a "general or exploratory" search, *Rabinowitz*, 339 U.S. at 62. Those holdings rested on the historical evidence-gathering justification for warrantless searches incident to arrest—*i.e.*, "to find and seize things connected with the crime as its fruits or as the means by which it was committed." *Harris*, 331 U.S. at 151, 153 (quoting *Agnello*, 269 U.S. at 30).

In the 1960s, however, this Court's decisions addressing searches of the area around an arrestee began "consistently referring to the narrower interest in frustrating *concealment or destruction* of evidence," rather than evidence-gathering generally, as well as the need for officers to prevent arrestees from gaining access to weapons. *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment) (emphasis added) (citing *Sibron* v. *New York*, 392 U.S. 40, 67 (1968), and *Preston* v. *United States*, 376 U.S. 364, 367 (1964)). The Court ultimately held in *Chimel* v. *California*, 395 U.S. 752 (1969), that those narrower justifications de-

limited the area deemed to be within an arrestee's "immediate control," *id.* at 763, and overruled *Harris* and *Rabinowitz*, *id.* at 768. Thus, under *Chimel*, officers' authority to search the area around the arrestee is generally limited to "the area from within which he might have obtained either a weapon or something that could have been used as evidence against him." *Ibid.* *Chimel* did not curtail, however, officers' plenary authority to search the person of an arrestee.

b. After *Chimel*, the question arose whether the narrowly focused evidence-destruction and officer-safety justifications that circumscribe searches of the area around an arrestee also limit the authority to search particular items found on his person. In *United States* v. *Robinson*, *supra*, this Court held that they do not: when the officer has made a lawful arrest, she need not determine whether the justifications identified in *Chimel* are sufficiently implicated by a particular item before searching it. That holding resolves this case.

In *Robinson*, a police officer had detected an object in the breast pocket of the defendant during his lawful arrest for operating a vehicle without a permit and obtaining a permit by misrepresentation. See 414 U.S. at 220-221, 223. The officer removed the object from the pocket and, after seeing that it was a crumpled cigarette package, opened it, finding heroin capsules inside. See *id.* at 223. This Court held that the warrantless search was lawful under the search-incident-to-arrest doctrine without regard to whether the *Chimel* justifications supported it. "Having in the course of a lawful search come upon the crumpled package of cigarettes," the Court concluded, the officer "was entitled to inspect it; and when his inspec-

tion revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct." *Id.* at 236.

Reviewing "the history of practice in this country and in England," *Robinson* explained that law-enforcement officers historically have possessed "unqualified authority" to search "the person of the arrestee by virtue of the lawful arrest" and that "[t]he validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation." 414 U.S. at 224-225, 235 (citing *Weeks*, 232 U.S. at 392) (emphasis omitted). "Throughout the series of cases in which the Court has addressed * * * the permissible area *beyond* the person of the arrestee which such a search may cover," the Court said, "no doubt has been expressed as to the unqualified authority of the arresting authority to search the *person* of the arrestee." *Id.* at 225 (emphases added).

Robinson further rejected the proposition that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting" the authority. 414 U.S. at 235. Nothing in precedent or history, the Court found, supports "case-by-case adjudication." *Ibid.* Rather, "the fact of the lawful arrest * * * establishes the authority to search," and, therefore, "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Ibid.*

This Court built on *Robinson* in *United States* v. *Edwards*, 415 U.S. 800 (1974), holding that police may conduct a search incident to arrest of objects found on

an arrestee after detaining him and taking him to the station house. In *Edwards*, the defendant had been arrested late at night for attempted burglary and brought to jail. See *id.* at 801. The next morning, without obtaining a warrant, officers removed the defendant's clothes and sent them to a forensic lab to determine whether they contained paint chips linking him to the crime. See *id.* at 802. This Court held the search lawful, explaining that "both the person and the property in [an arrestee's] immediate possession may be searched at the station house after the arrest has occurred at another place and if evidence of crime is discovered, it may be seized and admitted in evidence." *Id.* at 803. "[T]aking from [an arrestee] the effects in his immediate possession that constituted evidence of crime," the Court explained, "is a normal incident of a custodial arrest." *Id.* at 805. "[T]he legal arrest of a person," the Court stated, "for at least a reasonable time and to a reasonable extent[,] take[s] his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." *Id.* at 808-809 (citation omitted).

Edwards thus underscored that the authority to search the person of the arrestee, including any items found on his person, rests principally on the reduced expectations of privacy triggered by the fact of arrest. See *King*, 133 S. Ct. at 1979. As Justice Powell explained in *Robinson*, because an arrest is already a "significant intrusion of state power into the privacy of one's person," when an arrest meets the strict requirements of the Fourth Amendment, it "justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evi-

dence and disarming the arrestee." 414 U.S. at 237 (concurring).

Robinson and *Edwards*, and the unbroken understanding of the Fourth Amendment that they reflect, establish that the police may search any items found on the person of an arrestee without first determining "whether or not there [is] present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Robinson*, 414 U.S. at 235; see *Moore*, 553 U.S. at 177 ("The interests justifying search are present whenever an officer makes an arrest."). As this Court reiterated twice last Term, the "constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence." *King*, 133 S. Ct. at 1971 (citation omitted); see *McNeely*, 133 S. Ct. at 1559 n.3.

Equally important, the authority to search the person of the arrestee was traditionally justified by the government's general interest in gathering evidence of crime, not only the narrower interests in preventing the destruction or concealment of evidence and protecting officer safety. See *Weeks*, 232 U.S. at 392. Neither *Chimel* nor any other decision of this Court has held that the narrower interests that limit searches of the *area* around the arrestee also limit searches of items found on the arrestee's *person*.

The court of appeals thus erred in asking whether the specific justifications identified in *Chimel* are sufficiently implicated by cell phones. Officers enjoy a "traditional and unqualified authority" to search any item found on an arrestee, *Robinson*, 414 U.S. at 229, and no historical or doctrinal justification exists to ex-

clude cell phones from the scope of that historical adjunct to officers' arrest power.[5]

c. The court of appeals rested its contrary holding on two post-*Robinson* decisions addressing a different question entirely: the authority of officers to search an area near the arrestee at the time of arrest but not within his reaching distance at the time of the search. Those decisions do not justify diminishing officers' historical authority to search items found on an arrestee.

In *United States* v. *Chadwick*, 433 U.S. 1 (1977), abrogated on other grounds by *California* v. *Acevedo*, 500 U.S. 565 (1991), the police searched a locked footlocker that was sitting in the open trunk of the arrestees' automobile, finding marijuana. See *id.* at 4. The search was conducted ninety minutes after the police had taken possession of the footlocker. See *ibid.* In holding the search invalid, the First Circuit had concluded under *Chimel* that the 200-pound footlocker was not even within the arrestees' "immediate control." *United States* v. *Chadwick*, 532 F.2d 773, 780-781 (1976). The government then conceded in this Court that the footlocker "was not within [the arrestees'] immediate control" at the time of their arrests. *Chadwick*, 433 U.S. at 14; see U.S. Br. at *14, *Chadwick*, 1977 WL 189820 (No. 75-1721). The Court

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[5] *Edwards* held that a search, at the stationhouse, of items found on the arrestee the day after arrest was reasonable incident to his arrest, but suggested that such search authority was not unlimited in duration. See 415 U.S. at 808-809. The search of respondent's cell phone here took place at the stationhouse shortly after his arrest and presents no question about the search of a cell phone substantially removed in time from the arrest.

affirmed the First Circuit's judgment, holding that the search was unlawful because "[o]nce law enforcement officers have reduced luggage or other personal property *not immediately associated with the person of the arrestee* to their exclusive control, * * * a search of that property is no longer an incident of the arrest." 433 U.S. at 15 (emphasis added).

Chadwick did not limit searches of the *person* incident to arrest. As *Chadwick* itself explained, those searches stand on a different doctrinal footing altogether. Searches of the person, it said, are "justified by [the] reduced expectations of privacy caused by the arrest," whereas searches of the area around the arrestee are not. 433 U.S. at 16 n.10. And consistent with *Robinson* and *Edwards*, the Court left undisturbed the authority of police to search an item "immediately associated with the person of the arrestee," even once it is reduced to officers' "exclusive control." *Id.* at 15. Far from supporting the court of appeals' holding, therefore, *Chadwick* makes clear that the police have broad authority to search items found on the person of an arrestee without obtaining a warrant.

Arizona v. *Gant*, 556 U.S. 332 (2009), concerned the authority to search the area where an arrest was made after that area is no longer within reaching distance of the arrestee. In *Gant*, the police had searched the passenger compartment of the arrestee's vehicle, finding a firearm and cocaine, after he had been handcuffed and placed in a squad car. See *id.* at 335-336. The Court held that once a vehicle's passenger compartment is no longer within the immediate control of an arrestee, police lack blanket authority to search it (although they may search that area if they have reason to believe it contains evidence of the

crime of arrest, see pp. 45-47, *infra*). 556 U.S. at 343-344. The Court concluded that allowing searches of an area no longer within the immediate control of the arrestee would "untether the rule from the justifications underlying the *Chimel* exception," because an arrestee at that point cannot gain access to that area to destroy evidence or retrieve a weapon. *Ibid.* Like *Chadwick*, however, *Gant* did not cast doubt on officers' longstanding authority to search items found on the *person* of an arrestee and therefore does not support the court of appeals' ruling in this case.

The court of appeals concluded that it was required to apply *Gant*'s methodological approach—which required a correlation between the law-enforcement interests identified in *Chimel* and the scope of the search incident to arrest—to searches of items found on the person of an arrestee. See Pet. App. 20a-24a. For the reasons discussed in Section A.2, *infra*, cell-phone searches readily satisfy that test. But putting that aside, the court of appeals committed a more basic error: unlike the authority to search the area within the arrestee's reaching distance, the authority to search a person incident to arrest derives primarily from the "reduced expectation[] of privacy caused by the arrest." *Chadwick*, 433 U.S. at 16 n.10; see *King*, 133 S. Ct. at 1979. For that reason, "[t]he fact of a lawful arrest, standing alone, authorizes [the] search"; no further justification is necessary. *Id.* at 1971 (quoting *Michigan* v. *DeFillippo*, 443 U.S. 31, 35 (1979)).

d. The search of a cell phone involves not only the search of the body of a person and the seizure of the phone, but also a further inspection of the phone itself. That further examination, however, does not remove the search from the scope of law-enforcement authori-

ty confirmed in *Robinson* and *Edwards*. In both *Robinson* and *Edwards*, the fact that evidence of crime was contained inside the object seized—a crumpled cigarette package and the arrestee's clothing, respectively, neither of which could have reasonably been thought to contain a weapon—was not immediately apparent without a further search of the object's contents. Indeed, in *Edwards*, the clothing was subjected to a forensic analysis, see 415 U.S. at 802, yet this Court had little trouble concluding that the search did not require a warrant. This Court has reached the same conclusion in other cases involving the inspection of items found on the person of an arrestee. See *DeFillippo*, 443 U.S. at 34, 40 (holding valid search at station house of "tinfoil packet secreted inside a cigarette package" found in shirt pocket of arrestee); *Gustafson* v. *Florida*, 414 U.S. 260, 262-263, 265-266 (1973) ("Having in the course of his lawful search [of an arrestee] come upon [a] box of cigarettes, [the officer] was entitled to inspect it."). In all of those cases, officers theoretically could have set the object aside and obtained a warrant before examining it. But this Court has never required that.

Nor does the fact that evidence contained on a cell phone will often consist of written material—names, phone numbers, text messages—render the search-incident-to-arrest doctrine inapplicable. Officers' historical authority to conduct searches incident to arrest extended to the examination of documents found on the person of the arrestee, which are often the most critical evidence of criminal conspiracies. As a 19th Century Irish court explained in one of the landmark search-incident-to-arrest cases, "from the earliest times it has been the settled and unvarying practice to

seize * * * proofs of guilt" such as "letters from co-traitors evidencing the common treasonable design, found in the possession of a traitor" who has been arrested, so that they may be produced "in evidence at the trial." *Dillon* v. *O'Brien & Davis*, 16 Cox C.C. 245, 248 (Exch. Div. Ir. 1887) (cited at *Weeks*, 232 U.S. at 392; *Carroll*, 267 U.S. at 158; *Robinson*, 414 U.S. at 230) (discussing rule "in treason and felony"). Thus, for example, in *Chiagles*, *supra*, Judge Cardozo upheld the warrantless search of papers found on a suspect arrested for arson, two of which turned out to be incriminating letters, against a challenge under a New York analogue to the Fourth Amendment. See 142 N.E. at 583. He explained that officers have the authority to "search[] the person of the prisoner for anything that may be of use as evidence upon the trial, or for anything that will aid in securing the conviction," and that it would be inconsistent with that historical understanding to draw a line "between books and papers on the one hand and other articles on the other." *Id.* at 584 (internal quotation marks and citations omitted); see *Welsh* v. *United States*, 267 F. 819, 821 (2d Cir.) (letter), cert. denied, 254 U.S. 637 (1920).

This Court's decisions have accordingly found "no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized." *Gouled* v. *United States*, 255 U.S. 298, 309 (1921), overruled on other grounds, *Warden* v. *Hayden*, 387 U.S. 294, 300-301 (1967). This Court approved, for example, the examination incident to arrest of "two diary pages * * * [that] contained what was in effect a full confession of [the defendant's]

participation in [a] robbery," *Hill* v. *California*, 401 U.S. 797, 799-802 & n.1 (1971), rejecting the defendant's argument that the search was not authorized in light of the diary's "personal" nature. See Pet. Br. at 19, *Hill*, *supra* (No. 51). Similarly, the Court permitted the introduction into evidence of "a ledger and certain bills" seized during a search incident to arrest. *Marron* v. *United States*, 275 U.S. 192, 193, 198-199 (1927).[6] The examination of a cell phone is thus materially indistinguishable from the inspection of items found on the person of an arrestee that this Court and common-law courts historically have upheld under the search-incident-to-arrest doctrine.

e. The categorical authority of officers to conduct a full search of any item found on an arrestee makes eminent practical sense in light of the realities of police work. In arrest situations, officers are called upon "to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989). They must decide how best to advance a criminal investigation and to protect the public from what may be ongoing criminal activities. They are also subject to myriad other rules and standards imposed by the Constitution and statutory law that regulate everything from what officers must say to arrestees to how much force they can use to apprehend them to the scope of the

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[6] Because the searches in *Hill* and *Marron* occurred before this Court's decision in *Chimel*, *supra*, the Court applied "pre-*Chimel* standards" permitting a search of the premises of arrest. *Hill*, 401 U.S. at 802. *Chimel*, however, did not affect the police's pre-existing authority to search written material properly seized incident to arrest.

permissible area of a search. To ask a law-enforcement officer to render a lawyer's judgment about whether the circumstances of the arrest, or the nature of a particular object, supports search authority—particularly when the officer may have limited information about the crime or the background of the arrestee—"would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field." *Kentucky* v. *King*, 131 S. Ct. 1849, 1860 (2011).

Requiring an item-by-item analysis of whether the *Chimel* justifications are sufficiently implicated would also cast doubt on common police practices that lower courts have long allowed, following this Court's straightforward guidance in *Robinson*, *Edwards*, *Chadwick*, and other cases. It has been well settled in lower courts for at least three decades that "it is proper for the police to seize a briefcase or package in the possession of a person at the time of arrest, and subsequently to search the property without a warrant after the arrested person has been taken into custody," *Chadwick*, 433 U.S. at 21 n.2 (Blackmun, J., dissenting). Courts of appeals have consistently applied *Robinson* and *Edwards* to uphold the warrantless search of a variety of personal items seized from the arrestee's person at the time of his arrest, such as pagers, wallets, purses, address books, and briefcases.[7] Were this Court to conclude that cell phones de-

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[7] See, *e.g.*, *United States* v. *Ortiz*, 84 F.3d 977, 984 (7th Cir.) (pager), cert. denied, 519 U.S. 900 (1996); *United States* v. *Diaz-Lizaraza*, 981 F.2d 1216, 1223 (11th Cir. 1993) (wallet, address book, and pager); *United States* v. *Uricoechea-Casallas*, 946 F.2d 162, 166 (1st Cir. 1991) (wallet); *United States* v. *Carrion*, 809 F.2d 1120,

mand an item-specific analysis, it would destabilize the settled framework for evaluating those kinds of searches, see *Hill*, 401 U.S. at 802, and sow confusion among officers making quick decisions in the multitude of unexpected circumstances they confront each day.[8]

2. *Even if officers' search authority were subject to item-by-item exceptions, a cell-phone exception would not be warranted*

Even if the Fourth Amendment required courts to draw item-by-item exceptions to officers' search-incident-to-arrest authority, no sound reason would justify excluding cell-phone searches from the general rule. The historical justifications that this Court and common-law courts identified for the authority to search a person incident to arrest—obtaining evidence, identifying the suspect, and protecting officer safety—apply with far greater force, in fact, to searches of cell phones than to searches of virtually

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1123, 1128 (5th Cir. 1987) (billfold and address book); *United States* v. *Watson*, 669 F.2d 1374, 1383-1384 (11th Cir. 1982) (wallet, address book, and papers); *United States* v. *Smith*, 565 F.2d 292, 294 (4th Cir. 1977) (address book); *United States* v. *Eatherton*, 519 F.2d 603, 610-611 (1st Cir.) (briefcase), cert. denied, 423 U.S. 987 (1975); *United States* v. *Lee*, 501 F.2d 890, 892 (D.C. Cir. 1974) (purse); see also *United States* v. *Frankenberry*, 387 F.2d 337, 339 (2d Cir. 1967) (diary).

[8] Even without authority to search an arrestee incident to arrest, some searches of items found on the person of an arrestee will be justified because of "exigent circumstances," a Fourth Amendment doctrine that the government did not raise in this case. See *McNeely*, 133 S. Ct. at 1559. But that exception requires the police to predict whether a court will later conclude that the totality of the circumstances justified the search. See *ibid.*

any other containers. It would therefore be historically and doctrinally anomalous to require prior judicial authorization for searches only of those devices.

a. As explained above, until the 1960s, the principal law-enforcement interest that this Court cited for the search-incident-to-arrest exception was the "interest in gathering evidence relevant to the crime for which the suspect had been arrested." *Thornton*, 541 U.S. at 629 (Scalia, J., concurring in the judgment). Indeed, in its first decision discussing the doctrine, this Court grounded the authority in the need to "discover and seize the fruits or evidences of crime," *Weeks*, 232 U.S. at 392, and that understanding comported with views of 19th Century courts and legal commentators, see pp. 13-15, *supra*. In *Chimel*, this Court focused on the narrower interest in preventing the concealment or destruction of evidence (as well as disarming the suspect). That focus was sensible in determining the spatial reach of officers' authority to search the area around the arrestee, for which the common law did not provide a clear answer.

But in determining whether to fashion exceptions for particular items found on the *person* of an arrestee, which officers have historically enjoyed "unqualified authority" to search, *Robinson*, 414 U.S. at 247, this Court should not limit its consideration to the justifications set forth in *Chimel*. Rather, it should measure the search against the more general evidence-gathering justification that underpinned officers' search authority as an original matter. And under that justification, law-enforcement officers have a compelling interest in searching cell phones found on persons whom they have arrested.

i. Cell phones are now critical tools in the commission of crimes. Cell phones can memorialize communications among confederates, capture criminal activities on camera, and contain clues as to the location of victims or contraband. Certain crimes, such as respondent's offense of drug distribution, are very likely in today's world to be facilitated through the use of cell phones. As cell phones acquire more sophisticated features in the future, moreover, they will only become more useful in the commission of criminal offenses. Law-enforcement officers therefore have a powerful interest in searching the cell phone of an arrestee as soon as possible to advance an investigation and disrupt ongoing criminal enterprises.

Of course, the police always have an interest in investigating crime, and that is ordinarily insufficient, standing alone, to justify a warrantless search. See *Vernonia*, 515 U.S. at 653. But a search for evidence incident to arrest is fundamentally different from other evidence-gathering searches. For one, "it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended." *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment). A warrantless search incident to arrest will often accompany a warrantless arrest prompted by conduct that the officers recently observed or that otherwise occurred close in time to the arrest. And because cell phones are communication devices, they are particularly likely to contain evidence of a just-completed illegal act—a text message between gang members, for example, or a call to a drug dealer.

More generally, the point of arrest marks the beginning of a critical phase in a criminal investigation. Once confederates or family members learn that the

suspect has been detained, they may take action to inhibit the ensuing investigative activities. Drugs may be flushed, records destroyed, or witnesses intimidated, and co-conspirators may flee. Officers may have no specific reason to suspect such conduct (and therefore no legal ground to invoke the exigency exception to the warrant requirement, see note 8, *supra*). After witnessing a drug deal, for example, they may know nothing about the seller or his confederates. But they may infer from experience that it is critical to act quickly during the period immediately following a probable-cause arrest to obtain evidence and disrupt further crimes, even absent an articulable exigency. The search-incident-to-arrest doctrine embodies a judgment that the government's interests at that moment outweigh the suspect's diminished privacy interest in items held on his person.

Searches of cell phones can be especially important in crime investigation and prevention. A cell phone can quickly tell an officer the names of the arrestee's confederates or other parties to an unlawful transaction, the location of his stash of contraband or weapons, or the time and place for a planned assault or robbery. The usefulness of that information will be at its apex immediately upon the suspect's arrest. Once that critical period begins, officers, "for at least a reasonable time and to a reasonable extent," *Edwards*, 415 U.S. at 808-809 (citation omitted), should retain their "traditional and unqualified authority" to search the phone for evidence of crime. *Robinson*, 414 U.S. at 229.

Excluding cell phones from officers' general authority to search an arrestee would also leave an anomalous gap in their investigative tools. For centu-

ries, officers who lawfully apprehend suspects have been able to examine documents and other items found on their persons to facilitate an investigation. A cell-phone exception would handicap officers' efforts where the criminal suspects employ technological replacements. That would foster the inequity that those offenders who use more advanced technology would have a special protection from police investigation that does not apply to those who keep records of their criminal activity with only pen and paper.

ii. Cell-phone searches also serve the time-sensitive law-enforcement interest in determining or confirming the identity of an arrestee. This Court has recognized that "[i]n every criminal case, it is known and must be known who has been arrested and who is being tried." *King*, 133 S. Ct. at 1971 (quoting *Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cnty.*, 542 U.S. 177, 191 (2004)). "An 'arrestee may be carrying a false ID or lie about his identity,'" *ibid.* (quoting *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510, 1521 (2012)), and therefore law-enforcement officers will often seek confirmation that he is who he claims to be. The "inspection of an arrestee's personal property," this Court has further explained, "may assist the police in ascertaining or verifying his identity." *Illinois* v. *Lafayette*, 462 U.S. 640, 646 (1983) (discussing booking searches). Indeed, officers' authority to search arrestees was traditionally justified in part by the need to identify them. See p. 15, *supra*.

Cell phones are particularly useful in identifying an arrestee. A cell phone is likely to contain information indicating its possessor's real name, such as text or email messages. It also may include a landline telephone number or address. In this case, for example,

the police were able to determine the number associated with respondent's home, and from that information they determined his address from a public database. Quickly ascertaining that information can aid the police in processing an arrestee and can expedite an investigation. This Court has made clear, moreover, that "[a]n individual's identity is more than just his name or Social Security number," and includes such matters as his criminal history. *King*, 133 S. Ct. at 1971. Confirming a suspect's name and phone number can help police determine if he has a criminal history, a mental disability, or an outstanding warrant.

This Court has also recognized that police officers have a crucial interest in determining whether an arrestee is a member of a criminal organization such as a street gang—information that may be critical to determining where to place him in the jail population and to addressing other safety issues. See *King*, 133 S. Ct. at 1972 (citing *Florence*, 132 S. Ct. at 1519). Indeed, this Court has approved a close visual inspection of an arrestee's naked body to ascertain gang affiliation, explaining that "[t]he identification and isolation of gang members before they are admitted protects everyone in the facility." *Florence*, 132 S. Ct. at 1518-1519. The comparatively less intrusive search of a cell phone to determine gang affiliation advances that safety purpose as well. See Pet. at 3, *Riley* v. *California*, cert. granted, No. 13-132 (oral argument scheduled for Apr. 29, 2014).

b. Even if this Court considers only the narrower justifications that *Chimel* cited in defining the permissible search area around the arrestee, cell-phone searches should be deemed lawful. The interests iden-

tified in *Chimel*—preventing the destruction or concealment of evidence and protecting officer safety—apply with far greater force to searches of cell phones than to searches of virtually any other objects or containers that might be seized incident to arrest.

i. *Chimel*'s concern with preventing the destruction or concealment of evidence is implicated more directly by cell phones than by any of the objects at issue in searches that this Court has approved under the search-incident-to-arrest doctrine. See *DeFillippio*, 443 U.S. at 34 ("tinfoil packet secreted inside a cigarette package"); *Edwards*, 415 U.S. at 802 ("clothing"); *Gustafson*, 414 U.S. at 262 ("cigarette box"); *Robinson*, 414 U.S. at 223 ("crumpled up cigarette package"). Unlike other containers, which could be stored by the police to prevent their destruction until a warrant is obtained, cell phones contain information that is susceptible to destruction or concealment after the suspect has been taken into custody and denied access to the device. That threat has presented tremendous challenges to law-enforcement officers, and it is only growing more severe as rapidly changing cell-phone technology becomes even more sophisticated.

In the current technological landscape, law-enforcement officers face two types of problems, both of them serious. First, many modern cell phones allow users to lock their contents behind a password. See, *e.g.*, iPhone User Guide For iOS 7, at 36 (Oct. 2013) (iPhone Manual).[9] Importantly, a phone typically locks automatically after a period of inactivity, which a

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[9] http://manuals.info.apple.com/en_US/iphone_user_guide.pdf.

user can adjust. *Id.* at 10, 36. At that point, the password must be entered to access the phone's contents. *Ibid.* In addition, on the iPhone, the user can select a setting that ensures that "[a]fter ten failed passcode attempts * * * all [his] information and media are erased." *Id.* at 36.

Even in the most sophisticated law-enforcement forensic labs, overcoming a password lock is a difficult, time-consuming task, if it can be done at all. See Rick Ayers et al., National Institute of Standards and Technology, U.S. Department of Commerce, *Guidelines on Mobile Device Forensics (Draft)* 24 (Sept. 2013) (NIST Draft Guidelines);[10] see also, *e.g.*, *United States* v. *Brown*, No. 12-79-KKC, 2013 WL 1185223, at *5 (E.D. Ky. Mar. 20, 2013). It might take weeks or months. "Burner" phones popular among drug traffickers can be particularly difficult to unlock because they often have no port that can be attached to forensic tools that law-enforcement agencies use to override passwords. Some smartphones are effectively impenetrable once the password is triggered. See Simson Garfinkel, *The iPhone Has Passed a Key Security Threshold*, MIT Technology Review (Aug. 13, 2012).[11] And because of the time and expense it takes to override a password, it is unlikely that most law-enforcement agencies will have the resources to expend on the effort in any but the most serious cases. For cash-strapped local police agencies, information

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[10] www.nist.gov/forensics/research/upload/draft-guidelines-on-mobile-device-forensics.pdf.

[11] www.technologyreview.com/news/428477/the-iphone-has-passed-a-key-security-threshold/.

that is password-protected on even a comparatively simple smartphone may be as good as gone.

That means that if an officer seizes an arrestee's cell phone, the clock is ticking. The officer will not know if the phone is password-protected. Critical information to the investigation may be stored on the phone but will be effectively lost if it automatically locks. Many officers, however, now carry digital cameras, and if an officer has an opportunity to quickly search the phone at the scene for evidence, she can take pictures of the incriminating material, preserving it in case the phone locks. See NIST Draft Guidelines 29. But if a warrant were required, the delay in obtaining the evidence from a password-protected phone is not likely to be the time it takes to get in touch with a magistrate judge. The evidence might not be accessible for weeks or months, or it might be permanently lost. Thus, for password-protected phones that lock, it often will not be true that "police officers can reasonably obtain a warrant * * * without significantly undermining the efficacy of the search." *McNeely*, 133 S. Ct. at 1561; see NIST Draft Guidelines 35 ("Where possible, devices supporting encryption, such as Android and iOS devices, should be triage processed at the scene if they are found in an unlocked state, as the data may no longer be available to an investigator once the device's screen is locked, or if the battery exhausts.").

An officer could, theoretically, keep the phone from locking by continually touching the screen until a warrant can be secured. But that is impracticable, if not completely ineffective. The officer has things to do when she has arrested someone other than keep a cell phone awake until a judge issues a warrant. And if a

suspect has multiple phones, or the officer has arrested multiple suspects each of whom has a phone, it will not be logistically feasible to keep each phone active while taking the suspects to the detention facility and handling other matters. Moreover, before the officer has an opportunity to obtain a warrant, the phone's battery could have drained. For many phones, once their batteries are either drained or removed, encryption is deployed that makes it harder or impossible for law-enforcement officers to overcome the password when power is restored. See NIST Draft Guidelines 30-31; *United States* v. *Smith*, No. S1-4:11CR288, 2012 WL 1309249, at *13 (E.D. Mo. Mar. 13, 2012) (Adelman, M.J.).

The second problem is remote wiping. Commonly known techniques enable co-conspirators without physical access to a cell phone to erase information stored on it. Doing so requires no great technological acuity. Even on older-model phones like respondent's, for example, the list of "missed calls" could be entirely erased by calling the phone repeatedly from another number, because such phones typically store only the most recent missed calls. See NIST Draft Guidelines 29; see, *e.g.*, *United States* v. *Santillan*, 571 F. Supp. 2d 1093, 1102 (D. Ariz. 2008).

Smartphones have tremendously increased the ability to remotely destroy evidence contained on a cell phone because their entire contents can be erased from a different location. See NIST Draft Guidelines 29. As the Seventh Circuit has explained, "remote-wiping capability is available on all major cell-phone platforms," and "if the phone's manufacturer doesn't offer it, it can be bought from a mobile-security company." *United States* v. *Flores-Lopez*, 670 F.3d 803,

808-809 (2012) (Posner, J.) (citing websites offering remote-wiping software for Apple and Android smartphones). For example, Apple's iPhone manual explains that a user can employ its "Find My iPhone" application to "remotely wipe the data" on the phone. iPhone Manual 18. That can be accomplished simply by logging into a website from a computer or another phone and clicking "Erase."[12] Third-party applications allow users to remotely wipe a phone by sending it a text message. See NIST Draft Guidelines 29.[13] Even if the phone is off or not connected to the network, the phone's contents will be wiped as soon as it comes back online.

Remote-wiping technology is improving. A smartphone application currently in development called "Zones" would enable "geofencing": a person could preset his phone to perform certain actions automatically, including wiping itself of all user-inputted data and applications by returning to its factory settings, or sending an alert to other people, when it is brought into certain geographic areas. See Richard Chirgwin, *WhisperSystems creates "suicide pill" for phones*, The Register (Jan. 28, 2014) ("[I]f Alice is arrested * * * the phone can be programmed to send a preset e-mail or SMS to a defined recipient list; or the Super lock (unlock) or wipe functions can be assigned to a lo-

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[12] Apple Support, *iCloud: Erase your device*, http://support.apple.com/kb/ph2701 (last modified Feb. 17, 2014)

[13] *E.g.*, Sean Bianco, *Remote Wipe Mobile Devices via SMS* (Feb. 6, 2012), www.mobiledevicemanager.com/mobile-device-security/remote-wipe-mobile-devices-via-sms/.

cation."); [14] see also NIST Draft Guidelines 31. On a webpage for Zones, one recommended use is "draw[ing] zones around police stations" so that the phone will "factory reset on entry."[15]

The court of appeals dismissed the risk of remote wiping because it believed that the government can take measures to prevent it. The court suggested, for example, "simply turn[ing] the phone off or remov[ing] its battery." Pet. App. 23a. As discussed above, however, either of those steps could encrypt the contents of the phone, making it especially difficult for law-enforcement agencies ever to access them. Officers may be able to put a phone into "Airplane Mode," thus blocking access to a network, but this may inadvertently lead to the destruction of evidence. See NIST Draft Guidelines 30-31. Citing a law-review article, the court of appeals also said that officers "can put the phone in a Faraday enclosure, a relatively inexpensive device 'formed by conducting material that shields the interior from external electromagnetic radiation.'" Pet. App. 23a-24a (citation omitted). A Faraday bag can be effective in blocking signals from cell-phone towers. But it may fail if the phone passes close to a tower, where the signal is particularly strong. See NIST Draft Guidelines 30, 32. In addition, the phone expends a large amount of power when it searches for a signal, so placing a phone in a Faraday bag risks draining its battery—potentially triggering encryption of its contents, and at minimum re-

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[14] www.theregister.co.uk/2014/01/28/whispersystems_creates_suicide_pill_for_phones/.

[15] See https://github.com/WhisperSystems/Zones (last visited Feb. 28, 2014).

quiring police officers to obtain a power cord that works with the phone before searching it (a challenge given the wide variety of phones on the market). See *id.* at 30. And because the remote-wiping command will operate as soon as the cell phone reconnects to the network, officers would need access to special rooms or equipment enveloped in protective material in order to eventually examine the phone. See *id.* at 33. Even if a local police department has built such a room or has access to such equipment, it may not be feasible for officers to use it for routine investigations.[16]

These two threats—password protection and remote wiping—pose significant problems for law-enforcement officers who seek to preserve evidence contained on a cell phone. And even the court of appeals acknowledged that these threats may grow in the future. See Pet. App. 28a n.12 ("We acknowledge that we may have to revisit this issue in the years to come, if further changes in technology cause warrantless cell phone data searches to become necessary under one or both of the *Chimel* rationales.").

More generally, even under the most optimistic view of the government's ability to preserve evidence contained on cell phones, it cannot be doubted that cell phones implicate *Chimel*'s evidence-destruction justi-

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[16] The court of appeals also suggested that officers could blindly copy a phone's contents at the scene of arrest. Although some law-enforcement agencies have the sophisticated devices that can copy the contents of some phones, it would be very costly to provide every law-enforcement agent in the field with those devices, which may not work with a particular phone or be feasibly used given the other tasks officers must perform.

fication to a far greater degree than the objects at issue in this Court's precedents, all of which could have been stored by the police without examining them until a warrant could be secured. To hold that cell phones do not sufficiently implicate the *Chimel* evidence-destruction justification would therefore amount to a wholesale rejection of this Court's settled jurisprudence.

ii. Cell-phone searches also implicate the government's "most critical[]" interest in "ensur[ing] [officers'] safety during 'the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.'" *Moore*, 553 U.S. at 177 (quoting *Robinson*, 414 U.S. at 234-235). When officers arrest a suspect in a residence or other building, or even in a public area such as a road, they always face a risk that confederates or family members could arrive unexpectedly during and after the arrest, creating a dangerous situation for officers. As this Court has explained, "[u]nexpected arrivals by occupants or other persons accustomed to visiting the premises might occur in many instances." *Bailey* v. *United States*, 133 S. Ct. 1031, 1039 (2013).

The Court has advised that police can "mitigate that risk" during the execution of a search warrant for a residence "by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door." *Bailey*, 133 S. Ct. at 1039. Another way that officers can mitigate the risk of danger from sudden arrivals is by reviewing the recent calls and text messages of an arrestee's cell phone. That can alert the officers that confederates are headed to the scene of the arrest and that they should take safety precautions or call for backup.

As with the evidence-destruction justification, the search of a cell phone implicates *Chimel*'s safety concern more directly than the search of almost any other container found on the person of an arrestee. Although a bag might contain a gun or a knife, it could be moved out of reach of the suspect, eliminating the threat. But a cell phone, even once it is within the exclusive possession of the police, may have information that will warn officers about an imminent dangerous encounter.

c. The court of appeals thus clearly erred in its conclusion that cell phones do not implicate the basic justifications for the search-incident-to-arrest doctrine. The justifications identified in *Chimel*, as well as the evidence-gathering justification that originally gave rise to officers' authority to search a person incident to arrest, are more strongly implicated by the search of a cell phone than by the search of virtually any other object.

The court of appeals expressed the concern that cell-phone searches are not "self-limiting," by which it appeared to mean that individuals often have "more personal information on their cell phones than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers." Pet. App. 18a, 20a. It is true that cell phones can contain a great deal of personal information, but it is equally true that they can contain precisely the sort of information that police need to serve critical, time-sensitive law-enforcement interests in the period after an arrest is made. Moreover, numerous other items that courts have long permitted officers to search, such as diaries, address books, briefcases, and purses (see p. 27 & n.7,

supra), can also contain a great deal of personal information.

In any event, *Chimel*, together with *Robinson*, *Edwards*, *Chadwick*, and other decisions of this Court, stand at minimum for the proposition that when a person is arrested, and where the *Chimel* justifications are present, the government's law-enforcement interests outweigh the diminished expectation of privacy of the arrestee in items found on his person. Indeed, the fact of arrest triggers numerous other very substantial intrusions on an individual's privacy. He may be confined in facilities that lack any personal privacy, see generally *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-56 (1991), and potentially subjected to a strip search, including the requirement "to lift [his] genitals or cough in a squatting position," *Florence*, 132 S. Ct. at 1520. Given that baseline, it would be incongruous to confer on cell phones a special immunity from the "one exception" to the warrant requirement that was "established as firmly as the rule [against unreasonable searches and seizures] itself." *Chiagles*, 142 N.E. at 583 (Cardozo, J.).

3. The search-incident-to-arrest doctrine justifies a search of files stored on the phone, not files accessed remotely from the phone

The search-incident-to-arrest doctrine contains an intrinsic limitation that avoids concerns that a cell-phone search will result in unlimited acquisition of remotely stored data. See Pet. App. 18a. As discussed above, *Chimel* held that a search incident to arrest is generally limited to the area within the arrestee's immediate control, defined as his reaching distance. For obvious reasons, *Chimel*'s spatial limi-

tation ordinarily does not restrict a search of an item found on an arrestee's person. But because smartphones can connect to the Internet, they can be used to view computer files that are stored elsewhere—*e.g.*, on the Internet's "cloud," or on a home computer connected to a network.

Using a cell phone to retrieve files beyond those stored on the phone could not be justified as a search incident to arrest. *Chimel*'s spatial limit on searches incident to arrest would apply: accessing remotely stored files would not be a search of the phone, but rather a search of computer servers or hard drives located some distance from the place of arrest. Such a search might be reasonable based on some other Fourth Amendment doctrine, depending on where the files are stored (*e.g.*, folders accessible to third parties versus a private account), the law-enforcement interests at stake, and the public's expectation of privacy in those files as opposed to files stored on the phone. See, *e.g.*, *Maryland* v. *Buie*, 494 U.S. 325, 334 (1990) (approving protective sweep of home incident to arrest). But those searches would require a different basis than the search-incident-to-address doctrine.

B. Even If The Police Are Not Always Authorized To Search An Arrestee's Cell Phone, The Court Of Appeals Erred In Imposing A Blanket Prohibition

Robinson and *Edwards* set forth a categorical rule that the police may always search items found on the person of an arrestee without conducting "an assessment of whether the policy justifications underlying the exception * * * are implicated in a particular case." *McNeely*, 133 S. Ct. at 1559 n.3. Under those decisions, "a full search of the person" incident to ar-

rest "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Robinson*, 414 U.S. at 235. The court of appeals, however, held that cell phones "as a category" are not encompassed by that authority because (i) cell phones do not sufficiently implicate the *Chimel* justifications, and (ii) cell phones can store a great deal of personal information. See Pet. App. 15a-24a. But even if either of those objections were meritorious, the court of appeals erred in holding that a lawful arrest never authorizes a cell-phone search.

1. Officers may search an arrestee's cell phone when they have reason to believe that it contains evidence of the offense of arrest

The court of appeals believed that cell phones do not fall within the search-incident-to-arrest doctrine because they do not sufficiently implicate the *Chimel* justifications. See Pet. App. 20a-24a. Even if cell phones could be excepted from *Robinson*'s categorical rule and the court's *Chimel* analysis were correct, it would not mean that a lawful arrest never authorizes the search of a cell phone. Rather, as the Court has held in the context of vehicle searches incident to arrest that do not serve the *Chimel* justifications, law-enforcement officers would still be permitted to search a cell phone when they have reason to believe that it contains evidence of the offense of arrest.

a. In *Gant*, *supra*, this Court held that under *Chimel*, officers' search-incident-to-arrest authority does not uniformly encompass the passenger compartment of an arrestee's vehicle once the arrestee has been handcuffed and placed in a squad car. Like

the court of appeals here, the Court concluded that allowing officers to search the passenger compartment even when it is no longer within the arrestee's reaching distance would "untether the rule from the justifications underlying the *Chimel* exception." 556 U.S. at 343. But this Court's response to that problem was not to prohibit such searches categorically. Instead, "following the suggestion in Justice Scalia's opinion concurring in the judgment" in *Thornton*, *supra*, the Court held that officers could conduct a "search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Gant*, 556 U.S. at 335.

Although *Gant* cited "circumstances unique to the automobile context" as support for that authority, 556 U.S. at 335, Justice Scalia's opinion in *Thornton* (joined by Justice Ginsburg) had relied primarily on the common-law justification for search-incident-to-arrest authority: "the general interest in gathering evidence related to the crime of arrest." 541 U.S. at 629. That interest, he explained, justifies the search of an arrestee's automobile entirely apart from the *Chimel* rationales. He also pointed to the fact that "motor vehicles" are "a category of 'effects' which give rise to a reduced expectation of privacy and heightened law enforcement needs." *Id.* at 631 (citation omitted).

The "practical consequence" of anchoring officers' search authority to the traditional evidence-gathering justification, Justice Scalia explained in *Thornton*, is that the authority is not categorical. Rather, officers may conduct a search only when it is reasonable to believe that the car contains evidence relevant to the offense of arrest: "When officer safety or imminent evi-

dence concealment or destruction is at issue, officers should not have to make fine judgments in the heat of the moment[,] [b]ut in the context of a general evidence-gathering search, the state interests that might justify any overbreadth are far less compelling." 541 U.S. at 632.

Following the reasoning of Justice Scalia's *Thornton* concurrence and *Gant*, last Term, four Members of the Court joined an opinion explaining that the search-incident-to-arrest authority can rest on either of two independent bases. "The objects of a search incident to arrest," that opinion said, "must be *either* (1) weapons or evidence that might easily be destroyed, *or* (2) evidence relevant to the crime of arrest." *King*, 133 S. Ct. at 1982 (Scalia, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.) (emphases added).

b. Under that framework, even if the Court were to hold that officers lack categorical authority to search cell phones because such searches do not sufficiently accord with the *Chimel* justifications, officers should be authorized to search a cell phone when they reasonably believe that it contains evidence relevant to the crime of arrest.[17] Such a holding would be supported by *Gant*'s rationale. As with automobiles, individuals who have been arrested have "reduced expectations of privacy" in items found on their person. *Chadwick*, 433 U.S. at 16 n.10. And the search-incident-to-arrest doctrine was traditionally under-

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[17] That authority should extend to any crime for which officers have probable cause to charge the arrestee. See *Devenpeck* v. *Alford*, 543 U.S. 146, 152-156 (2004).

stood to provide a means for officers to gather evidence of the crime of arrest. See p. 15, *supra*.

A *Gant*-based standard would preserve officers' authority to search cell phones for evidence of many serious crimes while ensuring that police will not search individuals' cell phones "whenever an individual is caught committing a traffic offense." *Gant*, 556 U.S. at 345. A person "may be arrested for a wide variety of offenses," and not all give rise to a "reasonable basis to believe relevant evidence might be found" on his phone. *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment). But for those arrestees for whom it is reasonable to believe that their cell phones contain evidence relevant to the offense of arrest—such as individuals arrested for drug trafficking, gang-related offenses, financial frauds, and terrorism—officers would retain the authority to search their cell phones. See *ibid.* (concluding that because the "petitioner was lawfully arrested for a drug offense," it "was reasonable * * * to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted").

A *Gant*-based limitation on the authority of officers to search incident to arrest would dispel any concern that the government will use minor traffic violations as pretexts to search the cell phones of citizens for whom they lack probable cause to arrest for more serious offenses. Cf. *Gant*, 556 U.S. at 345. No one has demonstrated that law-enforcement officers are engaging in such behavior. But to the extent that theoretical possibility would raise unique concerns in the cell-phone context, a *Gant*-based standard would bar

officers from searching cell phones that have no reasonable relation to the offense of arrest.

2. If the Court concludes that cell phones raise materially greater privacy concerns than other items, the scope of those searches could be limited under the Fourth Amendment's reasonableness standard

The court of appeals distinguished cell phones from other objects on the ground that the "storage capacity of today's cell phones is immense" and information stored on a phone can be "of a highly personal nature." Pet. App. 16a-17a. As discussed above, that suggestion provides no ground to draw a special exception for cell phones from officers' otherwise plenary search authority. Neither this Court nor lower courts have excluded items like diaries, letters, briefcases, or purses from the search-incident-to-arrest doctrine on the ground that they can contain a potentially large volume of personal information. See p. 27 & n.7, *supra*.

But if it were thought that cell phones raise such unique privacy concerns that a special rule is necessary, the appropriate response is not to require a warrant for a type of search that has never required one—conferring on cell phones a greater immunity from officers' traditional search authority than any other object. Rather, any assertedly unique privacy concerns should be addressed by limiting the *scope* of cell-phone searches incident to arrest under the Fourth Amendment's basic reasonableness standard. Cf. *Edwards*, 415 U.S. at 808 n.9 ("This type of police conduct must [still] be tested by the Fourth Amendment's general proscription against unreasonable

searches.") (internal quotation marks omitted; alteration in *Edwards*).

a. In assessing the reasonableness of warrantless searches, this Court "balance[s] the privacy-related and law enforcement-related concerns" at stake. *King*, 133 S. Ct. at 1970. That balancing weighs "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States* v. *Knights*, 534 U.S. 112, 119 (2001) (quoting *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999)). Where a challenged search authority relates only to arrestees, this Court has conducted this balancing in light of the substantially diminished expectation of privacy enjoyed by a person who has been lawfully taken into custody. *E.g.*, *King*, 133 S. Ct. at 1977-1979; *Florence*, 132 S. Ct. at 1516; see also *Bell* v. *Wolfish*, 441 U.S. 520, 557 (1979).

The governmental interests at stake in a search incident to arrest are those that this Court and common-law courts have long identified: searching for evidence of crime, identifying the arrestee, and protecting officers. Those interests have historically been understood to be so significant that they justified a categorical authority to search any item found on the person of the arrestee, with no requirement that officers demonstrate a reasonable relationship between the object and a law-enforcement objective. See *McNeely*, 133 S. Ct. at 1559 n.3; see also *Robinson*, 414 U.S. at 235. That categorical authority also rested on officers' need to make "quick ad hoc judgment[s]" in arrest situations. *Ibid.*

On the other side of the balance, a person's phone may store a great deal of personal information, such as private communications, photographs, and videos. See Pet. App. 17a. But an *arrestee's* privacy interest is substantially diminished, particularly with respect to evidence of crime and his identity. Because the police have always been permitted to conduct a full evidentiary search of any items found on his person, including personal documents or photographs, an arrestee's expectation of privacy in those items is, at best, minimal.

In light of that balance, if a scope limitation were warranted, a reasonable search would extend to information on the phone that is reasonably related to the legitimate governmental objectives in discovering evidence of crime, identifying the arrestee, and protecting officers—but not to information that has no such connection. Accordingly, an officer should, at minimum, be permitted to search every area of a cell phone's contents in which she has an objectively reasonable basis to believe that information relevant to one of those objectives will be discovered. See *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) ("The scope of a search is generally defined by its expressed object."). That standard would prohibit officers from exploring an arrestee's phone in the mere hope that they might discover evidence of some crime. But unlike the court of appeals' blanket prohibition, it would not entirely vitiate officers' traditional authority to search a suspect incident to arrest in the context of cell phones.

That standard would come with a cost, because it would require an officer in the field to ask herself whether the steps she is taking in conducting a cell-phone search are reasonably tied to legitimate objec-

tives. One of the virtues of the traditional understanding reflected in *Robinson* and *Edwards* is that it does not require such case-by-case judgments. Nevertheless, a standard anchored to an objectively reasonable relationship between the scope of the search and legitimate law-enforcement objectives should, in the run of cases, coincide with officers' reasonable interests in conducting legitimate investigative activities.

b. Under such a scope-limited approach, officers should always be permitted to conduct a quick search of a cell phone to confirm a suspect's identity. As the facts of this case illustrate, a quick search of a cell phone can reveal that a suspect is lying about basic identifying information, such as his name, phone number, or address. That information can often be ascertained from a phone without a close examination of any particularly personal content. For example, a brief scan of the phone's list of contacts will show whether, as in this case, the phone has a saved contact for "my house."

In addition, officers should be permitted, at least where they have reason to believe that a suspect is involved in gang activity, to conduct a more extensive search of the phone to confirm or dispel that suspicion. Ascertaining whether an arrestee is a member of a street gang serves a multitude of significant law-enforcement interests, not least of which is the safety of officers and other detainees. See *King*, 133 S. Ct. at 1970-1975. For that reason, this Court has approved exceptionally intrusive searches designed to determine gang affiliation. See *Florence*, 132 S. Ct. at 1518-1519. Finally, officers would also be permitted to conduct a brief search of a cell phone's recent mes-

sages to determine if confederates or others might be headed to the scene of the arrest.

c. A more extensive search would be objectively reasonable if an officer has reason to believe the phone contains evidence of the offense of arrest. The scope of that search would depend on the nature of the offense. Drug traffickers, for example, can reasonably be expected to have evidence related to their transactions stored in the areas of the phone concerned with its communication functions—the call log, contacts list, text messages, and emails. But whether it is reasonable to believe that evidence related to drug trafficking will be stored in the multimedia features of the phone—*e.g.*, saved photos and videos—might require a case-by-case determination. Those sorts of files, however, would be categorically searchable for offenses particularly likely to involve photographic evidence, such as the distribution of child pornography.

In contrast to those broader searches, for a crime such as "texting while driving," officers would have authority only to search the text messages and emails sent or received during the period when the offense occurred. And for some crimes, such as routine traffic violations, it would not be reasonable to conduct a search of the cell phone for evidentiary purposes at all (although it would still be appropriate to conduct a quick search for identity-related information).

In some circumstances, an officer might reasonably believe that a particular folder, application, or document on a cell phone contains information related to a legitimate law-enforcement objective, but it becomes clear upon opening that item that it does not. The officer then should terminate her review of an area of the phone as soon as it becomes apparent that it is un-

likely to contain information relevant to a legitimate law-enforcement objective. To that end, as this Court has held in the context of other warrantless searches designed to meet a specific objective, an officer could be permitted to conduct "a cursory visual inspection" to confirm or dispel her reasonable belief that a particular area of a phone—for example, the text messages—contains evidence relevant to the crime of arrest. *Buie*, 494 U.S. at 327.

d. Regardless of any other limitation the Court might establish, the police should always be able to search areas of the phone for which individuals have no reasonable expectation of privacy—in particular, call logs. This Court held in *Smith* v. *Maryland*, 442 U.S. 735 (1979), that an individual lacks "a legitimate expectation of privacy regarding the numbers he dialed on his phone." *Id.* at 742 (internal quotation marks omitted). Under that holding, this Court has authorized law-enforcement officers to use pen registers to record the numbers dialed from a suspect's phone without a warrant. The Court explained that "[a]ll telephone users realize that they must convey phone numbers to the telephone company" and "that the phone company has facilities for making permanent records of the numbers they dial." *Ibid.* A person therefore "assume[s] the risk that the information w[ill] be divulged to police." *Id.* at 745.

Under the reasoning of *Smith*, this Court should, at minimum, preserve the authority of officers to search a cell phone's call log incident to arrest. It is true that unlike a pen register, the search of a cell phone is a Fourth Amendment "search," because the owner has a property right in the phone entirely apart from any reasonable expectation of privacy in its contents. See

United States v. *Jones*, 132 S. Ct. 945, 951-952 (2012). But to the extent that the Court creates a novel exception to officers' otherwise-plenary authority to search items found on an arrestee because of special privacy concerns raised by cell phones, it would be incongruous to apply that holding to information on the phone in which an individual lacks any reasonable expectation of privacy.

C. The Search Of The Call Log Of Respondent's Cell Phone Was Lawful

The search of the call log of respondent's cell phone complied with the Fourth Amendment. For the reasons set forth in Section A, *supra*, officers have plenary authority to search a cell phone found on an arrestee without a warrant. But even if the Court imposed either or both of the two limitations discussed in Section B, *supra*, the search here was reasonable.

1. If the Court categorically limited warrantless cell-phone searches to cases in which it is reasonable to believe that the phone contains evidence of the offense of arrest, the search here was permissible. The officers had reason to believe that the phone contained evidence relevant to the crime for which respondent was arrested: drug trafficking. The district court found that "[t]he officers, having seen the 'my house' notation on [respondent's] caller identification screen, reasonably believed that the stored phone number would lead them to the location of [respondent's] suspected drug stash." Pet. App. 66a. As one of the officers explained by affidavit, given "the large amount of cash" on respondent, his possession of "two cell phones," "the amount of drugs found" on the buyer, and other factors, he believed that respondent might

"have a large quantity of drugs stored somewhere." J.A. 21. And the officer knew from his "training and experience that when a drug dealer sells relatively large amounts of drugs, he typically keeps the drugs at his residence or a 'stash house.'" J.A. 21-22. The officer also had reason to believe that respondent was lying about the location of his true residence, in part because the buyer had told him that respondent lived in South Boston. J.A. 22.

Evidence indicating the location of contraband was relevant to the drug-distribution offense for which respondent was arrested. At minimum, it would tend to prove that respondent was in fact the person ("B") who sold the drugs to the buyer. Accordingly, if this Court establishes a *Gant*-like standard for cell-phone searches incident to arrest, it should conclude that the police did not need a warrant to search respondent's cell phone.

2. If the Court were to adopt scope limitations to avoid exploratory searches, the search here was also valid. The search of the call log was an objectively reasonable way to determine the number associated with the "my house" notation that was publicly displayed on the phone's external screen. The search was directed exclusively at determining identity-related information: respondent's true address. In addition, because the officers reasonably believed that respondent's home address would contain his drug stash, the scope of the search was also tailored to discovering evidence of the crime of arrest. Moreover, because officers searched only respondent's call log, he had no reasonable expectation of privacy in the information they reviewed in any event.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

RECORD AND BRIEFS

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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

BRIMA WURIE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the Fourth Amendment permit a warrantless search incident to arrest of the contents of a cell phone seized from a person who has been lawfully arrested?

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STATEMENT OF THE CASE

The police seized Brima Wurie's cell phone after arresting him without a warrant for a street crack cocaine sale. *United States v. Wurie*, 728 F.3d 1, 1-2 (1st Cir. 2013). The phone, a gray Verizon LG, model that opened "almost like a book," had both an exterior and interior screen. When it began ringing in the police station during the booking process and displaying the words "my house" on the exterior caller ID screen, the police decided to search the interior of the phone, looking for a phone number and location to attach to "my house." *Id.* at 2; J.A.49. An officer opened the phone and saw a picture of a woman and child as the interior screen's "wallpaper." He pushed a button to open the call log, which showed incoming calls from "my house." He pushed another button to find the phone number associated with "my house." *Id.*

Officers used a reverse telephone directory to obtain the address associated with the "my house" number. They went to that address and found a woman and child who looked like the people in the cell phone wallpaper photo. After obtaining a warrant, they searched the house. *Id.* The cocaine, marijuana, firearm, and ammunition they found formed the basis for a drug charge and a weapons charge (counts one and three), joined with a charge arising from the street sale (count two).

The United States District Court for the District of Massachusetts denied Mr. Wurie's motion to suppress the evidence obtained from the warrantless

search of his cell phone, holding that the officers conducted a constitutionally permissible search incident to arrest. *United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009). A jury convicted Mr. Wurie after a trial and the court sentenced him to a 262-month term of imprisonment.

On appeal, the government argued that a cell phone was like any other item carried on the person and could, based simply on the fact of lawful arrest, be thoroughly searched, whether at the scene of the arrest or at the police station. *Wurie*, 728 F.3d at 6-7. The government admitted that its interpretation of the search-incident-to-arrest exception "would give law enforcement broad latitude to search any electronic device seized from a person during his lawful arrest, including a laptop computer or a tablet device such as an iPad." *Id.* at 7. The United States Court of Appeals for the First Circuit rejected this interpretation.

The First Circuit recognized that cell phones and other personal electronic devices are not like a purse, a wallet, an address book, or any other container a person may carry. The personal electronic devices used by 85% of Americans may contain vast quantities of information "of a highly personal nature: photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records." 728 F.3d at 8. "It is the kind of information one would previously have stored in one's home and that would have been

off-limits to officers performing a search incident to arrest." *Id.* The court also noted that additional privacy implications arose from the fact that such devices "'increasingly store personal user data in the cloud instead of on the device itself,'" and questioned the government's ability to avoid accessing such information while searching a device. *Id.* n.8.

The First Circuit reviewed this Court's search-incident-to-arrest jurisprudence from *Chimel v. California*, 395 U.S. 752 (1969), through *United States v. Robinson*, 414 U.S. 218 (1973), and *United States v. Edwards*, 415 U.S. 800 (1974), to *Arizona v. Gant*, 556 U.S. 332 (2009). 728 F.3d at 3-5. The court determined that "what distinguishes a warrantless search of the data within a modern cell phone from the inspection of an arrestee's cigarette pack or the examination of his clothing is not just the nature of the item searched but the nature and scope of the *search itself.*" *Id.* at 9 (emphasis in original).

The First Circuit concluded that the warrantless search of data within a cell phone was not justified by the purposes of the search-incident-to-arrest exception, *i.e.*, officer safety and the preservation of evidence that an arrestee could conceal or destroy. 728 F.3d at 9-13. A data search was not necessary for officer safety. Nor, given available technologies, was it necessary to prevent the destruction of evidence. *Id.* at 10-11. The court explained that it was not suggesting a rule that would require a case-by-case assessment of whether a data search of a personal electronic device incident to arrest was justified by

officer safety or evidence preservation. Rather, because such searches had not been shown to ever be necessary for those purposes, it found them to be categorically unlawful. *Id.* at 12. This bright-line rule would be easy to administer in the field. *Id.* at 13. The court, however, did not forbid all on-the-spot searches of cell phones. Instead, it recognized that the exigent circumstances exception, which does require a case-specific review, would presumably allow an immediate, warrantless search of device data if there was probable cause to believe the device contained evidence of a crime and a compelling need made obtaining a warrant impracticable. *Id.* at 13.

SUMMARY OF ARGUMENT

A person today can carry a breadth and depth of private, personal information in her cell phone previously found only in the home. The seize-and-secure rule fashioned by the First Circuit permits police to seize a cell phone or other personal electronic device incident to arrest and retain control of it until a neutral magistrate determines whether it may be searched. The rule respects both law enforcement interests in obtaining evidence of crime, and the individual's interests in her papers and effects protected by the Fourth Amendment. It is a practical, easily administered rule and should be affirmed.

In *Chimel v. California*, 395 U.S. 752 (1969), the Court resolved inconsistencies in its prior definitions

of the constitutionally permissible scope of a search incident to arrest, an exception to the Fourth Amendment's warrant requirement. It explained that this exception is predicated on protecting officer safety and preventing the destruction of evidence, justifications that apply to both searches of a person placed under arrest and items seized from her person, and to searches of the area into which an arrested person can reach. The Court has repeatedly reaffirmed these principles.

While holding, in *United States v. Robinson*, 414 U.S. 218 (1973), that the police need not determine on a case-by-case basis whether these justifications were present before searching an individual's person, the Court did not hold these justifications were irrelevant or inapplicable to such searches. It did not create a special exception to the search-incident-to-arrest doctrine that wholly untethered searches of a person incident to arrest from these historical justifications. Accordingly, a search of a cell phone seized from a person that, categorically, cannot be justified as based on officer safety or the prevention of the destruction of evidence is not a constitutionally permissible search incident to arrest. For these reasons, the government's reliance on *Robinson* to justify the sweeping rule it seeks is misplaced.

No support for a warrantless search of a cell phone can be found in the limited expansion of the scope of a constitutionally permissible search of a recently vacated automobile incident to the arrest of its recent occupant established in *Arizona v. Gant*,

556 U.S. 332 (2009). *Gant* authorized a search when it is "reasonable to believe that evidence of the offense of arrest might be found," based on the "circumstances unique to the automobile context." *Id.* at 335. It should remain so limited. Automobiles have a history of different treatment under the Fourth Amendment based on their mobility and a multi-faceted reduction in reasonable expectations of privacy associated with them. Cell phones share none of the attributes of an automobile found to support the limited expansion in *Gant*.

Further, contrary to the government's claims, neither considerations of officer safety nor prevention of the destruction of evidence support the warrantless search of a cell phone incident to arrest. The contents of a phone seized by an officer cannot be used as a weapon. Its search cannot reasonably be viewed as addressing any likely threat to officer safety from others. Moreover, forensic tools and other devices can be used to prevent the destruction of evidence suspected to be contained in a phone. The contents of a phone can be copied and held, unexamined and undestroyed, until a neutral magistrate determines that there is probable cause for a particular search.

Nor does a limited warrantless search of portions of a cell phone's contents, such as its call log, fall within the scope of a constitutionally permissible search incident to arrest. Unlike the list of numbers dialed provided by a pen register or call records available from a telephone company, a cell phone's call log may often have associational data created by

the user. Moreover, a limited search rule is not readily administered in the field. An officer cannot be expected to know how to properly limit a search to only the call logs on each of the hundreds of models of cell phones available today.

In contrast to the government's limited search proposal, a seize-and-secure rule is a categorical rule requiring no item-by-item assessment of the capacities or capabilities of a particular phone by the officer in the field. The officer knows he may seize a cell phone possessed by an arrestee and hold it pending the issuance of a warrant. If deemed necessary, he may preserve the contents of the phone, unexamined. Nor does the rule preclude the application of some other exception to the warrant requirement. This Court should affirm the seize-and-secure rule as a proper balance between the law enforcement interest in investigating crime and the individual's interest in freedom from unreasonable searches and seizures.

ARGUMENT

THE FOURTH AMENDMENT DID NOT AUTHORIZE THE WARRANTLESS SEARCH OF BRIMA WURIE'S CELL PHONE INCIDENT TO HIS ARREST

As of January, 2014, ninety percent (90%) of adults in the United States owned cell phones; forty-two

percent (42%) owned a tablet computer.[1] These devices allow people to carry in their pocket or purse a breadth and depth of personal, private information previously found only in the home. "Searching a person's cell phone is like searching his home desk, computer, bank vault, and medicine cabinet all at once." *State v. Granville*, ___ S.W.3d ___, 2014 WL 714730, at *6 (Tex. Crim. App. Feb. 26, 2014). Even the simplest cell phone is capable of storing associational information, innermost private thoughts, memos, texts, voicemails, calendars and schedules, as well as phone numbers and addresses. Current models of devices can store and/or access medical information, financial information, travels, e-mails, innumerable other documents, and one's entire library. *Smallwood v. State*, 113 So. 3d 724, 732 (Fla. 2013); *United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012); *State v. Smith*, 920 N.E.2d 949, 954 (Ohio 2009). All of this personal, private information may be found through searching a device. The government asks this Court to transform the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement into a blanket rule that would allow police *carte blanche* access to this information as a matter of right – an interpretation that is virtually limitless and makes no distinction between a weapon,

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[1] Pew Research Center, *available at* http://www.pewresearch.org/data-trend/mobile/device-ownership/

a bag, a cigarette pack, a cell phone, a tablet, a laptop computer, or any other item a person may carry.

The FBI reports an estimated 12,196,959 arrests nationwide in 2012. This does not include data on citations for traffic violations.[2] Under the government's all-encompassing view, everyone arrested with a cell phone or tablet computer is automatically subject to a search of any and all aspects of their lives contained in that personal electronic device – regardless of the purpose of the arrest and without any connection between the device and the activity leading to the arrest. The Fourth Amendment does not authorize such an unprecedented ability to pry into the most private matters of any person arrested for any violation of law. This Court should reject the government's efforts to reformulate the scope of the search-incident-to-arrest exception by affirming the seize-and-secure rule of the First Circuit.

A. Mr. Wurie Had a Reasonable Expectation of Privacy in the Information Contained in His Cell Phone

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State . . . '(t)he security of one's privacy against arbitrary intrusion

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[2] Federal Bureau of Investigation, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons arrested

by the police' [is] 'at the core of the Fourth Amendment' and 'basic to a free society.'" *Schmerber v. California*, 384 U.S. 757, 767 (1966). "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. 347, 351 (1967) (internal citations omitted). *See also Bond v. United States*, 529 U.S. 334 (2000) (law enforcement officer's physical manipulation of bus passenger's carry-on bag violated Fourth Amendment even though bag was exposed to public). Although cell phones are frequently used in areas accessible to the public, persons have a reasonable expectation of privacy in the information contained within them.

Cell phones, like computers and tablets, are both "effects" and "papers" protected by the Fourth Amendment. These personal electronic devices may now contain or access virtually all of the "papers" traditionally kept in desks, file cabinets and boxes in the home and are among a person's most private "effects." *See, e.g., Wurie*, 728 F.3d at 8-9. Though these devices employ technology beyond what could be imagined at the time of the framing of the Constitution, whether they may be searched without a warrant incident to arrest requires applying established Fourth Amendment principles designed to protect the integrity of individual privacy even as technology evolves over time. *See United States v. Chadwick*, 433

U.S. 1, 9 (1977) ("[T]he Framers were men focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.").

An individual's reasonable expectation of privacy does not vanish because technological advances permit intrusions of a nature or scope not previously available. "[T]here are [limits] upon this power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Thus, the use of a thermal imaging device to obtain "any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search – . . . ," *id.* at 34 (internal citations omitted), and, if warrantless, is presumptively unreasonable, *id.* at 40. These limitations were again recognized recently in *United States v. Jones*, 132 S. Ct. 945 (2012), where attachment of a Global Positioning System (GPS) tracking device to an individual's vehicle and its use to monitor the vehicle's movements for four weeks was held to be a search. Although the opinion of the Court rested on the government's physical intrusion to install the device for the purpose of obtaining information, *see* 132 S. Ct. at 949-951, a concurrence by Justice Alito (joined by Justices Ginsburg, Breyer, and Kagan) found that the government's actions in long-term GPS tracking also violated the defendant's reasonable expectation of privacy. Justice Alito explained that for

common drug offenses, like the offense in *Jones*, "society's expectation has been that law enforcement agents and others would not – and indeed, in the main, simply could not – secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.* at 964. Justice Sotomayor agreed with Justice Alito in a separate concurrence, concluding that "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'" *Id.* at 955. In addition, Justice Sotomayor suggested that the intrusiveness of GPS surveillance of any duration might raise Fourth Amendment concerns because "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* at 955-956.

Like GPS surveillance, searches of cell phones and other personal electronic devices can generate a wealth of detail about a person's associations, personal information, and private life that would have been wholly unattainable from a search of one's person in the pre-electronic age. The government maintains that law enforcement officers can access that store of private, personal information without a warrant simply because someone is carrying a cell phone or other personal electronic device at the time of her arrest. Mr. Wurie maintains that the government's position misinterprets the scope, history, and purposes of the search-incident-to-arrest exception to

the warrant requirement and should be rejected by this Court.

B. The Search of the Contents of a Cell Phone Is Not Within the Scope of the General Search-Incident-to-Arrest Exception to the Warrant Requirement; It Is Not Supported by Either of the Two Justifications of Officer Safety and Prevention of the Destruction of Evidence

The search-incident-to-arrest doctrine is an exception to the "basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (citation omitted). The exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id.* The government both seeks to expand the basis for the exception, as explained in *Chimel v. California*, 395 U.S. 752 (1969), and misreads *United States v. Robinson*, 414 U.S. 218 (1973), which neither abandons nor expands on those purposes. The government further seeks to extend *Gant* to a context other than automobiles. This Court should reject the government's arguments.

1. *Chimel v. California* Defined the Constitutionally Permissible Scope of a Search Incident to Arrest

The permissible scope of a search incident to arrest fluctuated for the first half of the twentieth century.[3] In *Chimel*, the Court noted it had "been far from consistent" in its interpretation of the constitutionally permissible scope of a search incident to arrest and revisited the constitutionally permissible scope of such a search in light of "the background and purpose of the Fourth Amendment." 395 U.S. at 760 (1969). The Court concluded that it was constitutionally

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[3] *See, e.g.*, *Weeks v. United States*, 232 U.S. 383 (1914) (warrantless search of arrestee's home impermissible where arrest took place elsewhere); *Agnello v. United States*, 269 U.S. 20 (1925) (same); *Marron v. United States*, 275 U.S. 192 (1927) (warrantless search of all parts, including closets, of premises on which arrestee located and in which criminal enterprise was located permissible); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) (warrantless, general, unlimited search of office in which arrestee located impermissible); *United States v. Lefkowitz*, 285 U.S. 452 (1932) (same); *Harris v. United States*, 331 U.S. 145 (1947) (warrantless search of entire four-room apartment in which arrestee located permissible), *overruled by Chimel v. California*, 395 U.S. 752 (1969) (warrantless search that goes beyond arrestee's person and area from which he might obtain weapon or destructible evidence impermissible); *Trupiano v. United States*, 334 U.S. 699 (1948) (warrantless seizure of illegal still being operated by arrestee at time of arrest impermissible where agents had ample opportunity beforehand to obtain search warrant); *United States v. Rabinowitz*, 339 U.S. 56 (1950) (warrantless search of office in which arrestee located, including desk, safe and file cabinets, permissible), *overruled by Chimel v. California*, 395 U.S. 752 (1969).

reasonable to search the person of an arrestee "in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and "in order to prevent . . . concealment or destruction [of evidence]." *Id.* at 763. The Court held further that "the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule." *Id.*

In the forty years since *Chimel*, the Court has not wavered in its articulation of the limits placed on the search-incident-to-arrest exception to the warrant requirement. For example, this Court recently reaffirmed *Chimel*'s limiting principles when it observed, "[t]hat limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Arizona v. Gant*, 556 U.S. 332, 339 (2009).[4] *See also Virginia v. Moore*, 553 U.S. 164, 176 (2008) (stating that "officers may perform searches incident to arrest to ensure their safety and safeguard evidence.").

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[4] In *Gant*, this Court also held that "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." 556 U.S. at 335.

2. *United States v. Robinson* Adhered to *Chimel*'s Limitations

The government relies heavily on *United States v. Robinson*, 414 U.S. 218 (1973), *see* U.S. Br. 17-29, but *Robinson* cannot carry the weight the government places on it. In *Robinson*, the Court addressed the scope of the search-incident-to-arrest exception in the context of the search of a "crumpled up cigarette package" seized from the coat pocket of a person arrested for operating a motor vehicle after revocation of his operator's permit. After feeling objects in the package he could not identify, an officer opened it and found capsules containing what turned out to be heroin. 414 U.S. at 223-224.

The court of appeals had framed the relevant question as "whether and under what circumstances, an arresting officer may conduct a *full* search of the person incident to a lawful arrest for violation of a mere motor vehicle regulation." *United States v. Robinson*, 471 F.2d 1082, 1090 (D.C. Cir. 1972) (en banc) (emphasis in original). The circuit court concluded that under these circumstances, the scope of a permissible search incident to arrest was more limited than that authorized in *Chimel*. It held that, in the context of routine traffic arrests where the officer intends only to issue a violation, the only search permitted is the type of limited patdown for weapons authorized by *Terry v. Ohio*, 392 U.S. 1 (1968), based upon special facts or circumstances providing reasonable grounds to believe the person is armed and dangerous. 471 F.2d at 1097. Where the officer was

required to take the motor vehicle violator into custody, "a limited *frisk* of the suspect's outer clothing in order to remove any weapons the suspect may have in his possession" was permissible. 471 F.2d at 1098 (emphasis in original).

This Court rejected the appellate court's limitation of a search incident to arrest to a *Terry*-based weapons frisk. *Robinson*, 414 U.S. at 227-229. Recognizing that "[v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta," *id.* at 230, the Court examined the "sparse" authorities addressing the issue prior to 1914. *Id.* It found the "sketchy" authorities "tend[ed] to support the broad statement of the authority to search incident to arrest found in the successive decisions of this Court, rather than the restrictive one which was applied by the Court of Appeals in this case," *id.* at 232, 232-233. Essentially, the Court held that a *Chimel*-type search is permissible whenever a defendant is arrested, even if that arrest is for a routine traffic offense. Accordingly, the search of the cigarette package was constitutionally permissible.

The Court further held that the right to search incident to arrest did not require a case-by-case adjudication of whether "one of the reasons supporting the authority for a search of the person incident to a lawful arrest" was present. The fact of lawful arrest justified a full search of the person as an exception to the warrant requirement and a reasonable search. *Id.* at 235. The full search authorized was contrasted

with the limited search – a frisk for weapons – permitted by *Terry*. *Id.* at 232-234.

Critically, however, in approving a full search of the person, the Court did not question, change, expand, or dispense with the justifications for a search incident to arrest – officer safety and the prevention of the concealment or destruction of evidence – or suggest that different justifications might exist in this specific context. Indeed, some of the early cases in which the Court found a broad statement of authority to search incident to arrest described those searches as based on a need for preservation of evidence. *See Dillon v. O'Brien*, 16 Cox C.C. 245, 250 (Exch. Ireland, 1887) ("[T]he interest of the State . . . necessarily extends, as well to the preservation of material evidence of his guilt or innocence. . . ."); *Holker v. Hennessey*, 42 S.W. 1090, 1093 (Mo. 1897) ("[U]nless the arresting officer has the authority [to search a prisoner] immediately on making the arrest, all evidences of crime and of identification of the criminal might be destroyed before the prisoner could be taken to the magistrate.").

Robinson quoted *Chimel*'s application of the officer-safety and prevention-of-evidence-destruction justifications to the search of the person incident to arrest and reiterated that "[t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." *Id.* at 226, 234. Contrary to the

government's contention here, U.S. Br. 17, the Court did not suggest that those justifications were inapplicable to searches of the person and only applied to searches of areas within the arrestee's immediate control not on his person. They apply with equal force to the search of the contents of a cell phone as part of a search incident to arrest of the person.

3. The Limited Expansion of the Scope of a Constitutionally Permissible Search Incident to Arrest in *Arizona v. Gant* Should Remain Limited to Recently Vacated Automobiles

Just as the government's reliance on *Robinson* is misplaced, so, to, is its reliance on *Arizona v. Gant*, 556 U.S. 332 (2009). U.S. Br. 44-49. In *Gant*, this Court found that "circumstances unique to the automobile context" justified a somewhat broader application of the search-incident-to-arrest doctrine in the limited set of cases where an automobile was recently vacated by an arrestee. In such cases, police may conduct a search based on a reasonable belief that evidence of the offense of arrest might be found in the recently vacated vehicle. *Id.* at 335.

This narrow expansion of the authority to search incident to arrest should remain limited to the automobile context. This Court has repeatedly asserted that there is a reduced expectation of privacy associated with automobiles for a variety of reasons. Automobiles travel on public thoroughfares. They seldom

serve as a repository of personal effects. They are subject to pervasive governmental regulation and control. They are at risk for traffic accidents that may expose all of their contents to public view. *See, e.g.*, *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999). In addition, their mobility has been held to justify an exception to the warrant requirement where there is probable cause to believe evidence of crime will be found inside. *Carroll v. United States*, 267 U.S. 132 (1925). Adding these factors to the reduced expectation of privacy engendered by an arrest may justify the search of a vehicle simply for general evidence of the offense of arrest. Without those added factors, the reduced expectation of privacy engendered by an arrest alone does not support expanding the scope of a warrantless search incident to arrest outside the automobile context.

The government's suggestion that the same framework applicable to searches of automobiles should apply to searches of personal electronic devices, U.S. Br. 45-49, is misplaced because these automobile considerations do not apply to cell phones. The two situations are not comparable. There are no mobility concerns associated with a cell phone seized by the police. The use of cell phones is not subject to government control in the same way motor vehicles are. Although many cell phones are used in public, many are also used in the most private of places, like bedrooms and bathrooms. There is, moreover, a far greater expectation of privacy in the vast array of personal, private information contained in a cell phone than there is in an automobile.

Thus, the government's analogy to the search of an automobile fails and reason to believe evidence of the crime of arrest can be found by searching the phone does not justify ignoring the warrant requirement. Once the police have seized a cell phone, the justification for a search for evidence of an offense should be submitted to a neutral magistrate for a determination of probable cause for a search and the imposition of limits on any search authorized. Outside the context of the search of an automobile incident to the arrest of its occupant, this Court should continue to limit application of the search-incident-to-arrest exception only to those searches justified by the twin concerns of officer safety and the prevention of the destruction of evidence.

C. The Government's Contention That the Scope of a Search of the Person Incident to Arrest Is Not Limited to the Type of Search Necessary for Protecting Officer Safety or Preventing Destruction of Evidence Is Based on a Flawed Interpretation of This Court's Jurisprudence and a Selective Reading of History

The government seeks to avoid the lack of any connection between the warrantless search of the information contained in a cell phone seized from a defendant's person and the two *Chimel* justifications of officer safety and evidence preservation in two ways. First, the government argues that these justifications are limited to the search of "the area around the arrestee." It then argues that, as to the search of the

person of an arrestee, history and the reduced expectation of privacy after a lawful arrest mean that there are no limits and *Chimel* does not apply. Police have "full authority" to search the person of an arrestee and any and all items found on the person. U.S. Br. 13. These arguments rely on an incorrect reading of *Robinson*, a selective reading of history, and an undue emphasis on the arrestee's reduced expectation of privacy.

As discussed above, *supra* section B.2, *Robinson* did not limit application of the *Chimel* justifications for a search incident to arrest to the search of the area around the arrestee. It reaffirmed the applicability of the officer-safety and prevention-of-evidence-destruction justifications to the search of the person incident to arrest, but created a presumption that these justifications applied after a lawful arrest so that courts need not make case-by-case determinations that the government either had or had not established the presence of those justifications. This holding does not, as the government maintains, resolve this case. U.S. Br. 17.

It may be reasonable to assume that, in general, an arrestee may have a weapon hidden in small or unlikely packages or have evidence she would attempt to destroy and, therefore, to allow an officer to search for and seize such items after any arrest. Indeed, while the government asserts that the cigarette package in *Robinson* could not have reasonably been thought to contain a weapon, U.S. Br. 24, four judges on the D.C. Circuit Court found just such a

possibility. *See United States v. Robinson*, 471 F.2d 1082, 1114, 1117-1118 (D.C. Cir. 1972) (en banc) (Wilkey, Tamm, MacKinnon and Robb, JJ., dissenting) (discussing possibility of razor blade, and noting .22 caliber pistol made from small aluminum tube concealed in cigarette package). Arrestees may have a variety of small weapons. Arrestees found to have knives, scissors, razor blades and glass shards concealed on their person at a jail, *see Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510, 1519 (2012), are likely to have had them on their person at the time of their arrest.

The reasonableness of a presumption does not, however, eliminate the need for a court to evaluate whether a discrete category or type of search conducted subsequent to an arrest is not generally supported by the justifications of officer safety and prevention of evidence destruction. If, for example, an officer seized a labeled safe deposit box key while conducting a search incident to arrest and took that key to the bank, a warrantless search of the box using that key could not be justified as incident to arrest. We would expect the officer to obtain a warrant. In the same way, while it might be reasonable for an officer to remove the battery pack of a phone to search for any concealed items like razor blades, a search of the electronic contents of the phone cannot be justified on the same basis.

More importantly, a cell phone or other personal electronic device is not simply another closed container like the cigarette package in *Robinson*. It holds

digital data, not physical objects. It can be, and often is, a virtually limitless portal to an individual's private and personal information and thoughts, both on the device and stored elsewhere. There are no discrete boundaries to its contents. As the First Circuit and other courts have recognized, the container analogy is flawed, for it ignores both qualitative and quantitative differences. *See Wurie*, 728 F.3d at 9; *United States v. Wicks*, 73 M.J. 93, 102 (C.A.A.F. 2014); *Smallwood v. State*, 113 So. 3d 724, 736 (Fla. 2013); *United States v. Mayo*, 2013 WL 5945802, at *6-*10 (D. Vt. Nov. 6, 2013); *State v. Smith*, 920 N.E.2d 949, 954 (Ohio 2009).

Nor does history clearly support an unlimited search of an arrested person merely for purposes of general evidence-gathering. In *Thornton v. United States*, 541 U.S. 615, 629-631 (2004) (Scalia, J., concurring), Justice Scalia described the early history of the right to search the person arrested as supporting differing propositions. He noted that while some pre-*Chimel* case law justified searches incident to arrest on a more general interest in gathering evidence relevant to the crime of arrest, "*Chimel*'s narrower focus on concealment or destruction of evidence also has historical support."

Preventing the destruction of evidence requires the authority to search incident to arrest and to seize items that may be destroyed. Evidence can only be preserved if it is located and seized. But granting police the right to seize items from the person incident to arrest without a warrant does not require

authorizing them to search all items taken into custody without a warrant. *See, e.g.*, *United States v. Van Leeuwen*, 397 U.S. 249, 250 (1970) (approving detention of package pending application for search warrant). The First Circuit here did not hold, and Mr. Wurie does not argue, that his cell phone was impermissibly seized and secured by the officers. What the First Circuit correctly held is that the warrantless search of the private information in Mr. Wurie's phone was beyond the scope of a constitutionally permissible search incident to arrest and therefore violated the Fourth Amendment.

The government's contention that the reduced expectation of privacy arising from arrest justifies any and all searches of the person incident to arrest, including the warrantless search of the information in a cell phone possessed by the arrestee, gives that factor undue weight, to the point of entirely eliminating any privacy expectation. But the mere fact of arrest does not eliminate the arrestee's reasonable expectation of privacy and justify every post-arrest search as one incident to arrest. As this Court stated just last Term when considering the reasonableness under the Fourth Amendment of a post-arrest cheek swab to obtain a DNA sample, "This is not to suggest that *any* search is acceptable *solely* because a person is in custody." *Maryland v. King*, 133 S. Ct. 1958, 1979 (2013) (emphases added). *See also United States v. Edwards*, 415 U.S. 800, 809 (1974) (stating that "we do not conclude that the Warrant Clause of the Fourth Amendment is never applicable to postarrest

seizures of the effects of an arrestee."). Notwithstanding the reduced expectation of privacy following a lawful arrest, this Court did not, in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), analyze the constitutionality of a blood draw from a person arrested for operating under the influence of alcohol under the search-incident-to-arrest exception.

The government argues that *United States v. Edwards*, 415 U.S. 800 (1974) (upholding seizure and search of clothing taken from arrestee at jail the morning after his arrest), "underscored" that the authority to search the person of an arrestee incident to arrest "rests principally" on a reduced expectation of privacy. U.S. Br. 19. However, in addition to searches incident to arrest, the Court in *Edwards* also discussed the inventory rationale and the jailer's interest in searching a person being incarcerated as justifications for the seizure and search. 415 U.S. at 804-805 & n.6. It also noted the reasonableness of the police action "particularly in view of the existence of probable cause linking the clothes to the crime." *Id.* at 806. Nor did the defendant challenge the subsequent search of his clothing; he challenged only its seizure. *Id.* at 802.

Even though an arrestee's expectation of privacy is diminished (but not eliminated), the constitutionality of post-arrest warrantless searches must still be determined by weighing particular governmental interests against the reduced expectation of privacy and the nature of the intrusion, as this Court has done in a number of cases. In the context of the

incident-to-arrest search, officer safety and the prevention of evidence destruction must be weighed against the reduced expectation of privacy in determining whether a particular type or category of post-arrest search is constitutionally permissible. Other balances are applied in evaluating the applicability of other exceptions to the warrant requirement.

In *McNeely*, for example, the Court analyzed the constitutionality of the blood draw under the exigent circumstances exception. It rejected the state's argument that a warrantless blood draw was categorically reasonable because the "inherently evanescent" nature of blood alcohol concentration evidence always gives rise to exigent circumstances. 133 S. Ct. at 1560. *See also Illinois v. Lafayette*, 462 U.S. 640, 646-647 (1983) (search of defendant's shoulder bag at police station following his arrest was justified by interests of inventory search of property of person to be jailed); *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (visually invasive suspicionless post-arrest strip searches at jail prior to placement in general population justified by interests of institutional security and order); *Maryland v. King*, 133 S. Ct. 1958, 1974 (2013) (post-arrest taking of DNA pursuant to statute justified by government interest in identity, deemed relevant to custody decisions and "with consequences for every stage of the criminal process"). In no case post-*Chimel* has this Court adopted the blanket expansion of the search-incident-to-arrest exception advocated by the government in this case.

Here, while Mr. Wurie's reduced expectation of privacy may have justified searching his person and seizing his cell phone from his control to prevent the potential destruction of evidence, it did not justify the warrantless *search* of the personal and private information on that device. This Court did not in *Robinson*, and should not now, untether the scope of a constitutionally reasonable search incident to arrest of the person from its twin justifications of officer safety and the prevention of evidence destruction. It did not, and should not now, authorize a search of limitless scope of any item found on the person.

Such an expansion is particularly unwarranted with respect to cell phones and other personal electronic devices found on the person. Advances in technology have given people the ability to put the contents of their desk drawers and file cabinets in their pocket. The deeply personal and private nature of the information contained in those devices, as well as the sheer amount of that information, undermines the government's claim that their search can be justified by the reduced expectation of privacy accompanying an arrest. A person arrested for failing to wear a seatbelt, *see Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), should not be subject to having her private life and associations laid bare by granting police unfettered access to the complete contents of her cell phone.

The First Circuit examined the nature of the cell phone and the individual's privacy interests in the information it contains, and using the principles set

out in *Chimel* and applied in this Court's subsequent search-incident-to-arrest jurisprudence, concluded that the warrantless search of the information contained in that device could not be justified by a need for either officer safety or preventing the destruction of evidence. Rather, while officers could seize and secure the phone, they had to get a warrant to search its contents. This Court should reach the same conclusion.

D. The Warrantless Search of the Information in a Cell Phone Is Not Justified by Concerns About Protecting Officer Safety or Preventing Destruction of Evidence

The government alternatively maintains that the search of Mr. Wurie's cell phone was justifiable under the limitations imposed by *Chimel* because the search was necessary to protect officer safety, U.S. Br. 41-42, and because the information in the device was subject to destruction or concealment after it was taken into police custody, U.S. Br. 33-41. Neither of these contentions support a warrantlesss search incident to arrest.

1. Protecting Officer Safety

Chimel's officer safety justification for the warrantless search incident to arrest is the need to seize weapons or items that the arrestee may use to assault an officer. 395 U.S. at 763-764. Plainly, a cell phone or other personal electronic device poses no

such threat. Yet, the government hypothesizes a need to search a cell phone's contents on the highly unlikely possibility that "reviewing the recent calls and text messages . . . can alert the officers that confederates are headed to the scene of the arrest and that they should take safety precautions or call for backup." U.S. Br. 41. This claim, for which the government provides no support, rests on several unfounded assumptions: that an arrestee has confederates; that the confederates are armed with weapons and on their way in sufficient numbers to pose a threat to law enforcement on the scene; and that the confederates have announced their intent in text messages or calls. This hypothetical scenario falls far from the threat of an arrestee with weapons facing the arresting officer(s) described in *Chimel*. *See* 397 U.S. at 762-763.

If, in fact, that confluence of factors arises in a particular case, it is a scenario that can be addressed through the exigent circumstances exception to the warrant requirement. Claims of officer security are not exempt from scrutiny. Indeed, in *Bailey v. United States*, 133 S. Ct. 1031 (2013), this Court rejected claims of officer safety and search efficiency as justifying expansion of the *Summers*[5] rule authorizing officers executing a search warrant to detain the occupants of premises being searched to allow police to detain people some distance from the house. Here,

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[5] *Michigan v. Summers*, 452 U.S. 692 (1981).

there is no justification for adopting a blanket rule that officer safety is threatened by seizing and securing a cell phone rather than searching it.

2. Preventing Destruction of Evidence

The government argues that the availability of passwords, automatic locking, erasure, encryption, and remote wiping all justify a warrantless search incident to arrest to prevent the destruction of evidence. U.S. Br. 33-41. This parade of horribles is overblown.

The government begins by claiming that there are potential difficulties in overcoming a password lock used to secure information on a cell phone or other personal electronic device from access by others. U.S. Br. 34-37. However, it provides no information on how often such difficulties have been encountered, much less have actually resulted in the destruction of evidence. Further, there are forensic tools and assistance to obtain password protected information. *See, e.g.*, *United States v. Mathis*, 2013 WL 869511, at *1 (M.D. Fla. Feb. 19, 2013) (warrant for forensic examination of phone "to extract hidden, erased, or password-protected information"); *United States v. Brown*, 2013 WL 1185223, at *2 (E.D. Ky. Mar. 20, 2013) (provision of assistance from Apple to unlock password protected phone). The same issues arise in connection with the search of computers and other devices for evidence of child pornography. Yet warrants are routinely sought for such searches. *See, e.g.*,

United States v. Seiver, 692 F.3d 774, 775 (7th Cir. 2012) (discussing "staleness" and computer searches and listing examples of the "*very* large number of cases" concerning probable cause in a warrant to search a computer for child pornography) (emphasis in original). Finally, the government should not be allowed to transform the step an individual takes to safeguard the privacy of her information into a justification for eroding the protections of the Fourth Amendment.

The government next expresses concern over remote wiping, the erasing of information from a device by a third party. U.S. Br. 37-40. As the First Circuit explained, the use of a Faraday bag or enclosure – "a relatively inexpensive device 'formed by conducting material that shields the interior from external electromagnetic radiation'" – can address any danger of remote wiping. *Wurie*, 728 F.3d at 11. *See also United States v. Smith*, 715 F.3d 1110, 1114 (8th Cir. 2013) (describing use of Faraday bag and airplane mode to prevent remote wiping); Adam Gershowitz, *Seizing a Cell Phone Incident to Arrest: Data Extraction Devices, Farady Bags, or Aluminum Foil as a Solution to the Warrantless Cell Phone Search Problem*, 22 Wm. & Mary Bill Rts. J. 601 (2013). Turning the phone off and removing the battery can also prevent remote wiping. *United States v. Dixon*, ___ F. Supp. 2d ___, 2013 WL 6055396, at *2 (N.D. Ga. Nov. 15, 2013).

Copying the device's contents to another device without reviewing the information to preserve it pending a warrant authorizing a search is another option.

Wurie, 728 F.3d at 11; *United States v. Aispuro*, 2013 WL 3820017, at *14 (D. Kan. Jul. 24, 2013) (police copied contents of cell phone to storage device before later warrantless search; warrantless search held not to be within scope of search incident to arrest). Law enforcement has developed many methods for doing this. The FBI has cell phone investigative kiosks available at 84 offices around the country and portable kiosks available at 81 locations; these kiosks "allow users to extract data from a cell phone, put it into a report, and burn the report to a CD or DVD in as little as 30 minutes." U.S. Department of Justice, Federal Bureau of Investigation, "Cell Phone Investigative Kiosks," *available at* http://www.rcfl.gov/DSP_P_CellKiosk.cfm. The Regional Computer Forensics Laboratory Program, a program overseen by the FBI and executives from law enforcement agencies participating in a specific laboratory, also has cell phone investigative kiosks. U.S. Department of Justice, Federal Bureau of Investigation, "RCFLP Annual Report for FY 2012," *available at* http://www.rcfl.gov/DSP_N_annualReport.cfm. Use of these kiosks would provide a means of evidence preservation pending application for a warrant.

Some states already implement such practices. Vermont DEA Task Force Agents "used a Cellebrite machine to download the contents of Mayo's phones, including the cell phone number, a contacts list, text messages, call records, and assorted images." That machine "is a device used by law enforcement to extract data from cell phones and other digital devices."

United States v. Mayo, 2013 WL 5945802, at *2 (D. Vt. Nov. 6, 2013). *See also Dixon*, 2013 WL 6055396, at *2 (in case involving use of Cellebrite machine, holding that download of data was unconstitutional search, not within scope of search incident to arrest, where information reviewed without a warrant). According to an official statement from the Michigan State Police, "[d]ata extraction devices are commercially available and are routinely utilized by mobile communication device vendors nationwide to transmit data from one device to another. . . ." Michigan State Police, "Official Statement: Use of Cell Phone Data Extraction Devices," April 20, 2011, *available at* http://www.michigan.gov/msp/0,1607,7-123-1586-254783--,00.html. These devices could also preserve cell phone information pending a warrant.

Notwithstanding the government's assertions of the inadequacy of such protective measures, some jurisdictions preclude the warrantless search of cell phones or allow it only with consent or exigent circumstances. "It is Vermont state law enforcement's policy to obtain consent or a warrant for all cell phone searches according to the Government's witnesses." *Mayo*, 2013 WL 5945802, at *2. Similarly, "[t]he MSP [Michigan State Police] only uses the DEDs [data extraction devices] if a search warrant has been obtained or if the person possessing the mobile device gives consent." Michigan State Police, "Official Statement: Use of Cell Phone Data Extraction Devices," April 20, 2011, *available at* http://www.michigan.gov/msp/0,1607,7-123-1586-254783--,00.html. The District

Attorney for Westchester County, New York, provided the following advice to the law enforcement community concerning computer devices: "data which is not visible on an open screen or computer, including a cell phone, is not evidence in plain view. A search for stored data such as contacts and phone numbers in cell phones must be preceded by a warrant or supported by consent or exigent circumstances permitting a warrantless search." Janet DiFiore, District Attorney, Westchester County, "The Criminal Law News," Vol. 1, No. 2, p.7 (Feb. 2007).

Finally, while preservation options may not be without cost or effort, those costs cannot override an individual's interest in protecting her private information against unwarranted government intrusion. The law enforcement interest in investigating and gathering evidence of crime is undeniably a compelling one, but a general interest in effective law enforcement cannot be elevated over citizens' interests in the protection of their constitutional rights, including their Fourth Amendment rights. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 115 n.5 (2006) ("A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search.").

"[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); *Gant*, 556 U.S. at 349 (quoting *Mincey*). The Court has relied on that principle in refusing a murder scene exception, or an arson investigation exception, or a firearms exception to the

Fourth Amendment, all argued to be permissible means to facilitate law enforcement efficiency. *Flippo v. West Virginia*, 528 U.S. 11 (1979); *Mincey v. Arizona*, 437 U.S. 385 (1978) (murder scene); *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978) (arson investigation); *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (firearms). As the First Circuit stated: "[W]arrantless cell phone data searches strike us as a convenient way for the police to obtain information related to a defendant's crime of arrest – or other, as yet undiscovered crimes – without having to secure a warrant. We find nothing in the Supreme Court's search-incident-to-arrest jurisprudence that sanctions such a 'general evidence-gathering search.'" *Wurie*, 728 F.3d at 13 (internal citation omitted). This Court should continue to reject sanctioning a general evidence-gathering search under the search-incident-to-arrest exception and refuse to permit interests of law enforcement efficiency to override the individual's right to the protections of the Fourth Amendment. Instead, the Court should require a determination of probable cause by a neutral magistrate before the vast array of personal information in cell phones and other personal electronic devices is subject to search.

E. This Court Should Reject the Government's Suggestion to Redefine the Scope of the Search of a Cell Phone Incident to Arrest

The government alternatively asks this Court to redefine the scope of a search of a cell phone incident to arrest, contending that it is constitutionally

reasonable to permit the warrantless search of a cell phone seized from an arrestee for evidence of crime, identifying arrestees and protecting officers. It purports to impose limitations by suggesting that a search for such information be permitted only in "every area of a cell phone's contents" where officers have an objectively reasonable basis to believe such information would be found. U.S. Br. 49-54. This proposal is in reality a request for authorization to conduct a virtually limitless warrantless search.

A search for the discovery of evidence of crime imposes no constraints. Call logs, texts, notes and memos, contact lists, photos – all could be said to be areas that could contain such evidence. No area of the phone would be off-limits. Nor is there any justification for eviscerating the probable cause and warrant requirements of the Fourth Amendment simply to allow law enforcement officers to search for evidence of crime.

The suggestion that the need to confirm the identity of an arrestee generally justifies a warrantless search of a cell phone seized incident to arrest should also be rejected as another effort to make an end run around the probable cause and warrant requirements of the Fourth Amendment. There are reliable ways of confirming identity if identity is, in fact, an issue. *See, e.g., King,* 133 S. Ct. at 1975-1976. A cell phone search is not among them, for there is no way to determine whether a person is carrying a phone she owns and has registered in her own name or a phone belonging to someone else, and examining

information on a phone seized from a person will not tell the officer whether the person has used false information in securing phone service. Because any need to confirm identity will not be achieved by searching a phone seized incident to arrest, this rationale should not serve to justify a warrantless search.

Finally, as discussed previously, *see supra* section D.1, the cell phone poses no general threat to officer safety and provides no justification for general approval of a warrantless search. In short, none of the justifications offered for a warrantless search of a cell phone seized incident to arrest support a determination that a warrantless search for those purposes is constitutionally reasonable. Police officers should be allowed to seize and secure a cell phone incident to arrest and, unless some other exception to the warrant requirement is shown to be applicable, must comply with the probable cause and warrant requirements of the Fourth Amendment.

F. Call Logs Are Not Exempt From the Warrant Requirement

Finally, the government argues that officers should always be allowed to search call logs because this Court held in *Smith v. Maryland*, 442 U.S. 735 (1975), that an individual has no legitimate expectation of privacy in his dialed phone numbers. U.S. Br. 54. This expansive reading of *Smith* is unwarranted and constitutionally dubious as applied to records on an individual's cell phone for several reasons.

First, *Smith's* third-party doctrine does not apply to such records in the possession of the user, who is not a third party. As the government acknowledges, an individual does have a property interest in his cell phone, U.S. Br. 54, and therefore in the information on that phone, including its call logs. "The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001).[6]

Second, unlike the pen register involved in *Smith*, which recorded only outgoing phone numbers and did not indicate whether a call was completed, a cell phone call log may indicate not only whether a call was completed, but also contain records of incoming calls, thereby revealing more information than phone company pen register records. The call log also goes well beyond the limited pen register information of numbers dialed by including associational information created by the user of the cell phone. It may link a name, a nickname, or a place with a number. It may identify a number by relationship such as "psychiatrist," "partner," or "Mom." Indeed, it was just

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[6] In *United States v. Jones*, Justice Sotomayor suggested "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties[,]" describing this approach as "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

such associational information – the phone number associated with the descriptive "my house" – that the police officers searched for in this case.

The government's proposed broad rule also ignores the fact that the pen register information upheld in *Smith* was data obtained on a single day for a specific purpose – to see if the defendant was the person making threatening and obscene phone calls to a woman the caller had robbed. The government's proposed rule places no limit on law enforcement searching of call logs. Yet, the associational information to be gleaned from call logs may be enhanced if the logs are examined for an extensive period of time, providing patterns of calling that can be combined with other information to create a profile of the cell phone user's life.

Moreover, the government can no longer simply ask the phone company to install a pen register. Congress now requires law enforcement officers to obtain a court order, and limits the use of the pen register to 60 days with procedures for applying for an extension. *See* 18 U.S.C. §3121 *et seq.* While a statutory protection does not define constitutional protections, it is relevant to a reasonable societal expectation of privacy.

Nor is the government's call-record exception workable in the field. Officers searching cell phone call logs incident to arrest cannot be expected to know how to access only a call log on each make and model of cell phone. Efforts to locate a call log may well

expose protected information such as photographs or a listing of applications installed, which may, in turn, reveal personal or other associational information.

G. A Seize-and-Secure Policy Strikes the Proper Balance Between Law Enforcement Interests and the Individual's Interest in Freedom From Unreasonable Searches and Seizures With a Rule Easily Administered in the Field

The government contends that excluding the search of the information in cell phones and other personal electronic devices from the scope of a search incident to arrest will necessitate some item-by-item judgment that is difficult to administer in the field. U.S. Br. 26-27. This suggestion is unfounded. The seize-and-secure line drawn by the First Circuit, which this Court should affirm, is clear and easy for officers in the field to administer. Pursuant to this rule, the information in a cell phone or other personal electronic device may not be searched without a warrant incident to arrest. It is a categorical rule that does not require item-by-item assessment of a particular phone or device. Nor does it preclude the application of some other exception to the warrant requirement, such as exigent circumstances. The applicability of that, or any other exception, would have to be judged by the officer in the field and, if challenged, evaluated by a court, as it must be today.

The government's fear that recognizing the qualitative and quantitative differences between personal

electronic devices and other items people carry with them outside their homes will "destabilize" what it characterizes as a "settled framework" for the post-*Robinson* warrantless search of personal items such as pagers, wallets, purses, address books and briefcases, U.S. Br. 27-28, is misplaced for at least three reasons. First, a seize-and-secure rule for cell phones and other personal electronic devices does not affect the framework for analyzing when items which may contain weapons or evidence an arrestee may attempt to destroy may be searched incident to arrest. Second, the government ignores the fact that this Court has never held that items such as address books and papers may be read without a warrant incident to arrest pursuant to *Robinson*.

Third, the government fails to address the varied analyses in some of the lower court cases it cites as illustrative of a "settled" framework. *See* U.S. Br. 27-28. Some have simply cited *Robinson* as justification for the seizure of items such as wallets and address books. *See United States v. Watson*, 669 F.2d 1374, 1383-1384 (11th Cir. 1982); *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1223 (11th Cir. 1993). *United States v. Ortiz*, 84 F.3d 977 (7th Cir. 1996), emphasized the ephemeral nature of the information contained in a pager and the need to avoid loss of evidence, thereby tying its analysis to the *Chimel* justifications. Before concluding that agents "had ample justification for searching [the defendant], examining his wallet and seizing the contraband concealed in it," the court in *United States v.*

Uricoechea-Cassallas, 946 F.2d 162, 165-166 (1st Cir. 1991), described the justifications of a search incident to arrest as preserving evidence and seizing destructible contraband. The court also found the search of the defendant to be a permissible border or customs search. Accordingly, Mr. Wurie suggests that there is no "settled framework" for searching personal information contained in other items to be disturbed by holding that law enforcement may not search the contents of cell phones or other personal electronic devices pursuant to the incident-to-arrest exception to the warrant requirement.

The government acknowledges that even under the virtually unlimited scope it proposes, the search-incident-to-arrest exception does not justify using a seized cell phone to access files or information stored elsewhere (the internet "cloud" or a home computer). U.S. Br. 44. However, an officer searching an electronic device simply cannot know the location of the information accessed by pushing buttons on the innumerable types and models of devices. The impossibility of enforcing the concededly required limitation also counsels requiring a warrant to search for information on a cell phone or other device. Unlike the government's rule, the First Circuit's seize-and-secure line is readily administrable in the field. Equipped with this rule, an officer can know the precise parameters of his authority.

CONCLUSION

The government conducted a warrantless investigatory search of Mr. Wurie's cell phone subsequent to his arrest. It maintains that the search was permitted under the search-incident-to-arrest exception to the warrant requirement. However, as the First Circuit held, the search of the information contained in a cell phone is not of a type generally justified by either officer safety or the prevention of the destruction of evidence, the two justifications for a constitutionally permissible search incident to arrest. The First Circuit was correct. For the foregoing reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BRIMA WURIE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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REPLY BRIEF FOR THE UNITED STATES

Neither respondent nor his amici seriously dispute three basic propositions: (i) that since the Founding officers have conducted full evidentiary searches of individuals lawfully arrested on probable cause to find evidence of the crime of arrest, including the examination of objects, containers, and written material; (ii) that in an unbroken series of decisions from 1914 to 2013, this Court has recognized that this historical search authority applies categorically; and (iii) that if an officer does not search an unlocked cell phone as soon as she finds it, a significant risk exists that the police will never be able to recover evidence contained on the phone. Nevertheless, respondent contends that the appropriate legal rule for a cell phone is that the police may *never* search it incident to arrest absent an articulable exigency: in other words, an inversion of

the traditional rule in the circumstance in which that rule is most needed.

Nothing justifies that extraordinary result, and it should be rejected. Respondent would have this Court disregard history and the very real practical problems inherent in cell-phone searches in favor of entirely unsubstantiated fears that officers will use their authority to explore the private lives of people arrested for jaywalking and littering. At a minimum, respondent and his amici have failed to articulate any sensible justification for rejecting even the narrower approaches suggested by the government in its opening brief, which would preserve officers' traditional authority to some degree while dispelling concerns about pretextual arrests or limitless "exploratory" searches. Although respondent purports to apply settled constitutional principles to a 21st Century technology, his position would place law-enforcement officers at a greater disadvantage in their efforts to apprehend and punish criminals than ever before. The Fourth Amendment does not compel that outcome.

A. This Court Should Not Exempt Cell Phones From Officers' Search-Incident-To-Arrest Authority

1. Under the time-honored principle confirmed in *United States* v. *Robinson*, 414 U.S. 218 (1973), an officer may conduct a full evidentiary search of any object found on a person who is lawfully arrested.

a. Respondent does not satisfactorily reconcile his proposed rule with the holding of *Robinson*—or, for that matter, *Gustafson* v. *Florida*, 414 U.S. 260 (1973),

United States v. *Edwards*, 415 U.S. 800 (1974),[1] or *Michigan* v. *DeFillipo*, 443 U.S. 31 (1979), or the numerous other decisions recognizing that the "search[] of a person incident to arrest" is an "exception[] to the warrant requirement that appl[ies] categorically." *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1559 n.3 (2013). If respondent were correct that an on-the-spot search of a cell phone is unreasonable because an officer "may seize a cell phone possessed by an arrestee and hold it pending the issuance of a warrant" (Br. 7), then *Robinson*, *Gustafson*, *Edwards*, and *DeFillipo* were all wrongly decided, because the same could be said of any package or object. Although a container found on an arrestee's person could contain a weapon or destructible evidence (*id.* at 22-23), those risks can be fully mitigated by moving the package out of reaching distance of the arrestee.[2] The rule recognized in *Robinson* thus makes sense only in light of officers' broad historical authority to "search the person of the accused when legally arrested, *to discover and seize the fruits or evidences of crime*." *Weeks* v. *United States*,

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[1] Respondent (Br. 26) is incorrect that the defendant in *Edwards* challenged "only [the] seizure" of his clothing, not "the subsequent search." See Resp. Br., *Edwards*, *supra* (No. 73-88), 1973 WL 172386. The government argued in favor of both procedures. U.S. Br., *Edwards*, *supra* (No. 73-88), 1973 WL 173802.

[2] The crumpled cigarette package in *Robinson* could not have contained a firearm or bowie knife, but respondent correctly notes (Br. 22-23) that the D.C. Circuit dissent had argued that it could have contained a small object like a razor blade that might have been used to injure the arresting officer. The United States echoed that suggestion in this Court, see U.S. Br., *Robinson*, *supra* (No. 72-936), at 34, 1973 WL 173865, but the Court's holding did not turn on that possibility.

232 U.S. 383, 392 (1914) (emphasis added). That authority rests both on the critical law-enforcement interest in gathering relevant evidence as soon as practicable after an arrest and on the arrestee's reduced expectation of privacy in his person.

Respondent reads *Robinson* to establish a "presumption" (Br. 22-23) that the narrow interests identified in *Chimel* v. *California*, 395 U.S. 752 (1969)—officer safety and evidence preservation—are advanced by the search of any physical container found on the person of an arrestee. But *Robinson* did not refer to any "presumption." Nor did it frame the authority to search an arrestee's person as merely an application of *Chimel*. Rather, *Robinson* explained that the authority to search the person "ha[s] been treated quite differently" from the authority to search the premises of arrest addressed in *Chimel*. 414 U.S. at 224. The first authority has been "settled from its first enunciation," *ibid.*, and requires "no additional justification" beyond the lawful arrest, *id.* at 235.

Although respondent is correct that "[t]he permissible scope of a search incident to arrest fluctuated for the first half of the twentieth century" (Br. 14), that uncertainty existed only with respect to the premises of arrest, not the person of the arrestee. That fundamental distinction is explicitly recognized in cases on which respondent relies. For example, *Mincey* v. *Arizona*, 437 U.S. 385 (1978) (cited at Resp. Br. 35-36), which held that a warrantless search of an apartment incident to a homicide arrest violated the Fourth Amendment, distinguished *Robinson* and *Edwards* by explaining that "one who is legally taken into police custody has a lessened right of privacy in his person." *Id.* at 391. The same distinction was recognized in

United States v. *Chadwick*, 433 U.S. 1, 15, 16 n.10 (1977), abrogated on other grounds by *California* v. *Acevedo*, 500 U.S. 565 (1991). See U.S. Br. 21-22.

Respondent also cites (Br. 25) this Court's observation in *Maryland* v. *King*, 133 S. Ct. 1958 (2013), that custody alone does not mean that "*any* search is acceptable." *Id.* at 1979 (emphasis added). But the Court's examples—"a search of the arrestee's home," citing *Chimel*, and "invasive surgery," *ibid.*—differ fundamentally from the search of an item containing information found on an arrestee's person. Those items—be they wallets, diaries, letters, or address books—have long been held searchable by virtue of the arrest. No different rule is required for cell phones.

b. Neither respondent nor his amici substantially address the original understanding of the Fourth Amendment or the 19th Century cases indicating that search-incident-to-arrest authority was understood to serve the general interest in gathering evidence of the crime of arrest. Although Justice Scalia's concurrence in *Thornton* v. *United States*, 541 U.S. 615 (2004), noted some support for a rule cabined by the *Chimel* objectives, he cited for that proposition no cases holding unlawful a search of the person incident to arrest (including papers found on the person), and he noted that "[n]umerous" authorities support the broader understanding. *Id.* at 629-631; cf. *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C.P. 1765) (holding unlawful seizure of papers found in *home* of individual where both the arrest and search were conducted under a general warrant).

Respondent believes (Br. 18) that a sentence from *Dillon* v. *O'Brien & Davis*, 16 Cox C.C. 245 (Exch.

Div. Ir. 1887), supports his view that the only evidentiary purpose of a search incident to arrest is to protect evidence from concealment or destruction until a warrant can be obtained. But that view cannot be reconciled with the decision's explanation that the government may use "letters from co-traitors evidencing the common treasonable design" and other material seized during an arrest as "evidence at the trial." *Id.* at 248. If preventing concealment or destruction were the only purpose of a search incident to arrest, authorities could hardly *read* seized papers and introduce them in judicial proceedings without obtaining a warrant. Yet that has long been the rule. See *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (Hand, J.) ("[T]he law has never distinguished between documents and other property found upon the person of one arrested."); see also, *e.g.*, *People* v. *Chiagles*, 142 N.E. 583, 583 (N.Y. 1923) (Cardozo, J.); *Welsh* v. *United States*, 267 F. 819, 821 (2d Cir.), cert. denied, 254 U.S. 637 (1920).

Respondent also asserts (Br. 42) that no decision of this Court has "held that items such as address books and papers may be read without a warrant incident to arrest pursuant to *Robinson*." But as the United States has explained, this Court held that officers could read a diary incident to arrest in a pre-*Chimel* house search. U.S. *Wurie* Br. 25-26 (citing *Hill* v. *California*, 401 U.S. 797, 799-802 & n.1 (1971)). Respondent, moreover, cites no circuit decisions from any period holding that officers may not examine written material found in a search incident to arrest, in contrast to the numerous decisions cited by the United States. The categorical rule he favors thus threat-

ens to destabilize the long-settled legal framework that governs searches incident to arrest.

c. Respondent and his amici also characterize the distinction between a cell phone found on an arrestee's person and a cell phone within his reaching distance as arbitrary. See, *e.g.*, Rutherford Inst. Amicus Br. 14-15. But the basic distinction between items associated with a person and other items runs throughout this Court's search-incident-to-arrest precedents. A cigarette package found on the person of an arrestee can be searched in every case, see *Robinson*, 414 U.S. at 222-223, but a cigarette package sitting on the car seat next to him cannot be searched once he has been handcuffed and placed in a squad car (unless officers have reason to believe the vehicle contains evidence relevant to the offense of arrest), see *Arizona* v. *Gant*, 556 U.S. 332, 351 (2009).

Any legal rule that applies to a particular physical area can seem arbitrary at the margins. Cf., *e.g.*, *Bailey* v. *United States*, 133 S. Ct. 1031, 1042 (2013) ("A spatial constraint defined by the immediate vicinity of the premises to be searched is * * * required for detentions incident to the execution of a search warrant."). But this Court has recognized that items "immediately associated with the person of the arrestee" enjoy a lesser expectation of privacy than other items, *Chadwick*, 433 U.S. at 15, 16 n.10, just as an arrestee himself can be subjected to significant privacy deprivations upon arrest despite the fact that his home retains the same constitutionally protected status, *e.g.*, *Mincey*, 437 U.S. at 391.

2. a. In its opening brief and its amicus brief in *Riley* v. *California*, No. 13-212, the United States explained that even if the *Chimel* justifications were

thought to limit officers' authority to search objects found on the person of an arrestee, searching an arrestee's cell phone immediately upon arrest is often critical to protecting evidence against concealment in a locked or encrypted phone or remote destruction. The numerous party and amicus briefs in these cases have not seriously undermined that fundamental practical point. Although the briefs identify various techniques to prevent the remote-wiping problem (none of which is close to perfect), they barely address the principal problem that the government identified: automatic passcode-locking and encryption. For his part, respondent only perfunctorily addresses that issue, asserting that the government has provided "no information" on the scope of the problem. Resp. Br. 31. That is not so. In its two prior briefs, the United States provided extensive citations to forensic authorities and guidelines detailing the immense challenges that passcode-locking and encryption pose to law-enforcement investigations. See U.S. *Wurie* Br. 34-37; U.S. *Riley* Br. 11-14.

With respect to remote wiping, moreover, an amicus brief on behalf of law-enforcement organizations has documented instances in which that tactic successfully destroyed evidence—circumstances that are not likely to be described in reported judicial decisions because evidence cannot be introduced in a trial if it no longer exists. For example, in one California case, the members of a narcotics-trafficking organization "admitted that they had a security procedure, complete with an IT department, to immediately and remotely wipe all digital evidence from their cell phones." Association of State Criminal Investigative Agencies *Riley* Amicus Br. 9. And because remote-

wiping capability is widely and freely available to all users of every major mobile communications platform, individuals have used the same tactic. See U.S. *Riley* Br. 19-20. That problem will only increase as mobile technology improves and criminals become more sophisticated.

Respondent's amici also argue that remote wiping by confederates is irrelevant in a *Chimel* analysis because it is not physically triggered by the arrestee himself. See Nat'l Ass'n of Fed. Defenders et al. Amicus Br. 4-7. But this Court has never held (because the question has never arisen) that the ability of a third party to destroy evidence in police custody is not a relevant consideration under *Chimel*, and that distinction is not sensible. Whether information can be destroyed by the arrestee or by a confederate, the governmental interest is the same: the preservation of evidence. And in both cases—unlike, for example, a home-computer search—the arrestee has a reduced expectation of privacy in the item already lawfully seized from his person incident to the arrest.

But even if amici were correct in their premise that threats from third parties cannot justify the search of a cell phone incident to arrest, they ignore the principal justification in the government's opening brief—the threat of passcode-locking and encryption—as well as newer "geofencing" technologies that will enable individuals to preset their phones to automatically wipe in certain circumstances. Those tactics are not the actions of third parties, but rather automatic functions that an arrestee—potentially with police investigation in mind—can program into his phone.

b. Three additional points about the governmental interests at stake here bear emphasis.

First, the exigent-circumstances doctrine is a totally inadequate solution to the problems that the government has identified. That doctrine requires officers to evaluate "the facts and circumstances of the particular case" in deciding whether to conduct a search. *McNeely*, 133 S. Ct. at 1560. But the arresting officers will rarely know whether passcode locking or remote wiping is a particularized threat. Cell-phone searches thus are unlike the warrantless blood draws that this Court considered in *McNeely*, where the facts bearing on the exigent-circumstances analysis, such as the rate at which alcohol dissipates from the bloodstream and the likely delay before a warrant could be obtained, are known to officers before they need to make a decision. Unlike in *McNeely*, officers who seize a cell phone may well be "confronted with a 'now or never' situation," *id.* at 1561 (internal quotation marks and citation omitted), but they will realize that fact only when it is too late.

Second, the United States has explained why interposing a warrant requirement in this circumstance is likely to lead to the loss of evidence. Respondent incorrectly suggests otherwise. But to the extent the Court concludes that significant factual uncertainty remains about law-enforcement agencies' ability to preserve evidence from cell phones other than by examining the phone at the scene of an arrest, that uncertainty favors retaining the traditional *Robinson* rule for cell phones at least until the technological questions are resolved. U.S. *Riley* Br. 21-22 (citing *City of Ontario, Cal.* v. *Quon*, 130 S. Ct. 2619, 2629 (2010)). Basing a novel Fourth Amendment restriction on an incomplete understanding of a fast-evolving technology risks awarding offenders, and es-

pecially sophisticated criminal organizations, a powerful new tool to evade apprehension and punishment.

Third, even if some of the techniques that respondent and his amici have identified for preserving cellphone evidence until a warrant can be obtained can be effective in particular cases, that would not justify eliminating officers' historical search-incident-to-arrest authority in this context. As *Edwards* explained, when asking whether a particular category of warrantless searches complies with the Fourth Amendment, it is "no answer to say that the police could have obtained a search warrant": the relevant question is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable." 415 U.S. at 807 (citation omitted). This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Quon*, 130 S. Ct. at 2632 (internal quotation marks omitted); see *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557-558 n.12 (1976) ("The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.") That mode of analysis would be particularly unsuited to this context, in which some of the proposed solutions to the evidentiary problems posed by cell phones, like the use of Universal Forensic Extraction Devices, would impose substantial financial and logistical costs on law-enforcement agencies and therefore could "unjustifiably interfer[e] with legitimate law enforcement" activities. *Fernandez* v. *California*, 134 S. Ct. 1126, 1136-1137 (2014) (brackets in original) (citation omitted); see U.S. *Riley* Br. 17-19.

3. a. Cell phones differ from other containers that the police have always had authority to search because they can hold more written, photographic, and video material than could fit into a suitcase, a diary, or a purse. That quantitative difference, however, does not call for a special constitutional rule. Phones do not generally contain a different *type* of information than what an individual could carry on his person. Although phones might contain, for example, banking or health records, a person arrested forty years ago could have carried financial records in a briefcase or a pharmaceutical prescription in a purse. Likewise, books, correspondence, contacts lists, and photographs all have traditionally been subject to searches incident to arrest. And at least where, as here, a search incident to arrest occurs before "the administrative mechanics of arrest have been completed and the prisoner is incarcerated," *Edwards*, 415 U.S. at 804, little risk exists that officers could review a phone's entire contents in a gratuitous intrusion into personal privacy. Instead, officers will almost surely, as here, home in on matters of relevance to the arrest and ensuing activity.

Amici Center for Democracy & Technology et al. (CDT Br.) observe (at 11-12) that a smart phone may contain detailed locational information, which would go beyond what could have been found on a map with a highlighted route or a written set of directions. Neither this case nor *Riley*, however, involves locational information. Any issues it raises should be evaluated in a concrete case, in which the Court can consider the extent to which it is shared or available from providers—factors that will "shape the average person's expectations of the privacy of his or her daily move-

ments." *United States* v. *Jones*, 132 S. Ct. 845, 963 (2012) (Alito, J., concurring in the judgment). In any event, any concerns about that type of information would not justify eliminating search-incident-to-arrest authority in its entirety in this context.

b. Although respondent and his amici assert that the government has failed to substantiate the practical problems that cell phones pose to law-enforcement investigations, the most conspicuous absence of evidence is the lack of any record of police abuse of search-incident-to-arrest authority with respect to cell phones. Cell phones have been in common use for well over a decade, and only in recent years have some courts held that the traditional *Robinson* rule does not apply to them. Yet the numerous briefs filed in this case and *Riley* have not identified any wave of vast "exploratory" searches of arrestees' cell phones unrelated to the offense of arrest, or of agents prying into an individual's personal information with no reasonable connection to investigating and preventing crimes. Nor have the briefs pointed to any examples of an officer "orchestrat[ing] an arrest motivated only by the desire to trawl through the contents of someone's cell phone or electronic device." ACLU *Riley* Amicus Br. 14.

In the event this Court reconsiders the traditional *Robinson* rule in the context of cell phones, therefore, it must weigh the real, documented police need to promptly search cell phones of persons lawfully arrested against the unsubstantiated fear that officers will abuse their authority to intrude into arrestees' personal lives. That inquiry favors retaining the historical rule. This Court should not deprive officers of an investigative tool that is increasingly important for

preserving evidence of serious crimes based on purely imaginary fears that police officers will invoke their authority to review drug dealers' "reading history," ALA Amicus Br. 13, gang members' "appointments with * * * marital counselors," or armed robbers' "apps to help smokers quit," CDT Br. 9-11.[3]

4. The United States explained in its opening brief that the *Robinson* rule would not authorize officers to use a cell phone to access files not stored on the phone itself. Respondent suggests (Br. 43) that officers will not be able to determine in the field whether they are accessing information stored elsewhere. Officers may encounter practical difficulties in that respect, although they may also be able to turn off a phone's wireless signal at the outset of a search by switching it into "airplane mode." See U.S. *Riley* Br. 16-17 (noting potential obstacles to that approach). Ultimately, law-enforcement agencies will need to develop protocols to address that issue, and defendants will be able to en-

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[3] Amici assert that the FBI stores "all telephone data collected during FBI investigations[,] including data extracted from cellphones seized incident to arrest," in a "Telephone Applications Database," which then "feeds into" a database accessible by state and local law-enforcement agencies. Nat'l Ass'n of Criminal Defense Lawyers et al. *Riley* Amicus Br. 24. The database to which they refer "stores raw data derived from telephone records, known as 'metadata,'" such as telephone numbers and call-duration information, that has been lawfully obtained. Office of the Inspector General, U.S. Dep't of Justice, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records* 208 n.242 (Jan. 2010). It "does not store the contents of telephone conversations" or any other communications, *ibid.*, and the database is accessible only to the FBI for investigative purposes.

force the limitation through suppression motions. No information indicates that agencies are not up to that task.

B. A Categorical Prohibition On Cell-Phone Searches Incident To Arrest Is Wholly Unjustified

In its opening brief, the United States suggested two narrower approaches to searches of cell phones incident to arrest that would preserve much of officers' traditional authority and address the serious practical problems that cell phones present, while also mitigating the concerns raised by the First Circuit. Respondent and his amici have not identified any compelling reason to reject those narrower approaches in favor of a categorical prohibition on searches of cell phones incident to arrest. Respondent characterizes the government's suggestions as "an end run around the probable cause and warrant requirements" (Br. 37), but that assertion assumes (contrary to history and precedent) that those requirements apply. The issue in this case is whether the Court should impose new restrictions on a type of search that has never been subject to them because of special concerns allegedly raised by cell phones. Rather than imposing warrant and probable-cause restrictions that have never applied to searches incident to arrest, this Court could address any cell-phone specific concerns it may have through more targeted doctrinal responses.

1. The first approach suggested by the United States would permit officers to search a cell phone when they have reason to believe that it contains evidence relevant to the offense of arrest. This Court adopted that standard in *Gant*, *supra*, for a category

of vehicle searches incident to arrest that are not supported by the *Chimel* justifications—searches of the passenger compartment and its containers, such as purses and briefcases, when the arrestee is no longer in reaching distance of that area. The standard was first articulated by Justice Scalia in his concurrence in *Thornton*, *supra*, and he derived it from "[n]umerous earl[y] authorities" that justified searches incident to arrest as furthering "the general interest in gathering evidence related to the crime of arrest" rather than "the more specific interest in preventing its concealment or destruction." 541 U.S. at 629 (concurring in the judgment). The reasoning this Court employed in *Gant* would support a similar standard for searches of cell phones incident to arrest in the event that this Court agrees with respondent that those searches are not categorically lawful because they do not sufficiently implicate the *Chimel* justifications.

A *Gant*-based approach would also assuage the concern that respondent primarily invokes: that applying the *Robinson* rule to cell phones would permit a search "regardless of the purpose of the arrest and without any connection between the device and the activity leading to the arrest." Resp. Br. 9. Under a *Gant*-based approach, "[a] person arrested for failing to wear a seatbelt," for example, could not "be subject to having her private life and associations laid bare." *Id.* at 28. At the same time, arrestees like respondent—who conducted a drug deal by phone immediately before he was apprehended—would not acquire a special protection from police investigation that they would not have enjoyed had they used pre-Digital Age technology to perpetrate their crimes.

Respondent's only objection to a *Gant*-based approach is that *Gant* itself cited "circumstances unique to the automobile context." Resp. Br. 19. But the Court relied on Justice Scalia's *Thornton* concurrence, see *Gant*, 556 U.S. at 343, which explained that the pertinent "circumstances" were that "motor vehicles [are] a category of 'effects' which give rise to a reduced expectation of privacy, and heightened law enforcement needs," 541 U.S. at 631 (citations omitted). The same is true of objects found on the person of an arrestee—particularly objects that could quickly conceal or destroy the digital evidence they contain. See, *e.g.*, *Chadwick*, 433 U.S. at 16 n.10; U.S. *Riley* Br. 28. Moreover, even the automobile-specific considerations that respondent identifies (which were not voiced in *Gant*) support the authority to search a cell phone. Respondent claims that "mobility concerns" do not apply to cell phones (Br. 20), but the digital evidence on a cell phone can vanish or be concealed in an instant.

Some of respondent's amici argue that a *Gant*-based standard would not meaningfully limit police search authority. But as this Court explained in *Gant* with respect to vehicles, "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." 556 U.S. at 343. The same holds true for cell phones. It is not likely that an arrestee's cell phone will contain evidence of routine traffic violations, "littering, jaywalking, creating a disturbance on a school bus, riding a bicycle without a bell or gong, [or] disobeying police orders at a parade," ACLU *Riley* Amicus Br. 3. If there were any doubt about that, this Court could make it explicit, as

the *Gant* opinion did. And once such minor crimes are excluded, it becomes abundantly clear that the police's interest in finding and preserving evidence during the critical period after an arrest outweighs the diminished privacy interests of someone who has been lawfully arrested based on probable cause that he committed a crime.

2. Respondent and his amici have even less to say about a scope-limited approach, in which officers would be permitted to search cell phones incident to arrest only to the extent reasonably necessary to serve the legitimate law-enforcement interests of finding evidence of the offense of arrest, identifying the arrestee, and ensuring officer safety. Under that approach, courts would remain vigilant against uninhibited "exploratory" searches that do not serve those interests.

a. Respondent briefly argues (Br. 36-38) that a scope-limited approach would "impose[] no constraints" on officers. Br. 37. The government explained how the suggested standard would work in practice to impose such constraints. See U.S. *Wurie* Br. 49-55. Under a scope-limited approach, an officer could not peruse every area of a phone on the off-chance that evidence of some crime might be found there. Rather, the officer would be required to articulate a specific reason to believe that evidence relevant to the offense of arrest, officer safety, or arrestee identity would be found in each area of the phone she searched. And for offenses in which it is not reasonable to believe that any evidence would be found on the phone, an officer could do no more than conduct a brief examination of the phone for identity- and

safety-related information. Evidence obtained from broader searches would be suppressible.[4]

Respondent's contention that this approach would not impose an enforceable limitation is belied by the other contexts in which officers are subject to case-specific limitations on the scope of their searches. For example, under *Maryland* v. *Buie*, 494 U.S. 325 (1990), officers may conduct a protective sweep of a house where an arrest is made only if they identify "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 334. Even when justified, the search is scope-limited: it is "not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found," and "[t]he sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger." *Id.* at 335-336. The *Buie* standard, like the scope-limited standard suggested here, requires officers to make case-specific judgments about the scope of a search under a general reasonableness standard and courts to evaluate those judgments in ruling on suppression motions.

One amicus brief argues that a scope-limited approach would be unworkable because certain applica-

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[4] Respondent is mistaken (Br. 37) that a cell phone is not useful for obtaining identifying information—such as an arrestee's real name, home phone number, or home address—because an arrestee might be carrying someone else's phone. Investigations always rely on probabilities, and in the vast majority of cases a cell phone found on the person of an arrestee will be his own.

tions on a phone pull information from other applications. See CDT Br. 31-32. For example, a social-networking application might access the phone's contacts list. That facet of cell phones does not render the scope-limited approach more complicated to apply. The question in every case is whether the specific steps the officer took in interacting with the phone were reasonably related to legitimate objectives. That it might not be reasonable to examine a particular application on the phone would not necessarily make it unreasonable to examine another application that pulls information from the first.

b. Even if the scope-limited approach entails fairly significant practical complexity, the same concern exists in any search under a warrant and thus any practical problems presented by the scope-limited approach are no more severe than under respondent's favored rule. If respondent's rule is adopted, at the time a magistrate issues a warrant, neither officers nor the magistrate will know what files or applications the phone contains. A typical warrant would identify information sought in the search (*e.g.*, drug ledgers, customer lists, financial records, and evidence of a suspect's use or ownership). Officers would then necessarily need to conduct at least cursory searches of relevant areas of the phone to determine whether they might contain the object of the search—a process indistinguishable from the scope-limited approach the United States has suggested. See *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976) (papers); *United States* v. *Williams*, 592 F.3d 511, 522 (4th Cir.) (computer), cert. denied, 131 S. Ct. 595 (2010).

A warrant-based approach would thus not limit the scope of any ultimate search, as compared to the

scope-limited approach described above. Rather, the primary function of a warrant requirement would be to preclude officers from searching a phone when they have reason to believe that it contains evidence of crime, but cannot establish the higher standard of probable cause—or cannot obtain a warrant before a phone locks and becomes inaccessible. Any benefits for personal privacy would not outweigh the very substantial risk to law enforcement in an arrest situation, including the inability to conduct any cell-phone search at all.

c. It is true that a scope-limited approach would require a more intensive ex post judicial evaluation of the lawfulness of a search than either the traditional rule or the *Gant*-based standard described above, which would limit which phones could be searched, but not the scope of the search. But it would be ill-advised to completely deprive the police of an important investigative tool in the interest of lessening a potential litigation burden. If this Court were to establish a scope-limited standard, police departments would develop standards of conduct for their officers and courts would make nuanced post-search judgments. That may not be ideal, but it is vastly preferable to eliminating on-the-spot search authority entirely in response to unsubstantiated fears of "exploratory" searches.

3. In its opening brief, the United States urged that, whatever other restrictions this Court might establish on searches of cell phones incident to arrest, it should always permit a search of areas of the phone containing information in which a person lacks a reasonable expectation of privacy—as relevant here, call logs. Respondent is correct (Br. 39) that the third-

party doctrine of *Smith* v. *Maryland*, 442 U.S. 735 (1975), does not directly apply to information on an individual's cell phone because a cell phone screen is not a record in the hands of a third party, and for that reason the United States does not contest that an examination of a call log is a Fourth Amendment "search." U.S. *Wurie* Br. 54-55. But searches of objects found on a person incident to arrest have always been considered to be reasonable searches within the meaning of the Fourth Amendment. If this Court were to draw a special exception from that settled doctrine for information on cell phones, on the theory that a phone can contain a large quantity of particularly private information, it should at least preserve officers' authority to review information in which the individual lacks a significant privacy interest, such as information that is also conveyed to telecommunications companies.

Respondent points out (Br. 39) that a call log can contain some information that is not conveyed to a company, such as the names that a user assigns to numbers. That is true, but that minimal additional information has no greater privacy value than the information contained in objects and containers that officers have long had authority to search incident to arrest, such as wallets, purses, address books, and briefcases.

C. Respondent Does Not Dispute That The Search Here Was Lawful Under Any Of The Government's Suggested Approaches

The government explained in its opening brief that the search here was lawful under any of the approaches that it outlined, and respondent does not appear to

contest that point. The officers in this case conducted a limited search of respondent's cell phone, not to delve into his private affairs, but to learn his true address with the hope of confiscating his likely supply of illegal narcotics. That focused search was well within the scope of searches incident to arrest that law-enforcement officers have conducted since the Founding.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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IN THE

Supreme Court of the United States

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari
to the California Court of Appeal, Fourth District
(Additional caption on inside cover)

BRIEF FOR THE AMERICAN LIBRARY ASSOCIATION AND THE INTERNET ARCHIVE AS AMICI CURIAE SUPPORTING RILEY AND WURIE

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Library of Congress
Law Library

UNITED STATES,

Petitioner,

v.

BRIMA WURIE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

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BRIEF FOR THE AMERICAN LIBRARY ASSOCIATION AND THE INTERNET ARCHIVE AS AMICI CURIAE SUPPORTING RILEY AND WURIE

INTEREST OF THE AMICI CURIAE[1]

The American Library Association ("ALA") is a nonprofit professional organization of 57,000 librarians dedicated to providing and improving library services and promoting the public interest in a free and open information society. Founded in 1876, the ALA actively defends the right of library users to read, seek information, and speak freely.

The Internet Archive is a public non-profit organization that was founded to build an "Internet library," with the purpose of offering permanent access for researchers, historians, scholars, and artists to historical collections in digital format. Founded in 1996 and located in San Francisco, California, the Internet Archive collects and receives data and digitizes source material from a multitude of sources, including libraries, educational institutions, government agencies, and private companies. The Internet Archive then provides free access to its data—which include text, audio, moving images, software, TV news, and archived web pages—to researchers, his-

[1] Letters reflecting the parties' consent to the filing of this brief are on file with the Clerk or being lodged herewith. No counsel for a party authored any portion of this brief. No party and no other entity, except *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

torians, scholars, and the general public throughout the world. As a digital library, the Internet Archive is working to prevent the Internet—a new medium with major historical significance—other "born-digital" materials, and ephemeral physical media from disappearing into the past, by preserving society's cultural artifacts and providing access to them. Collaborating with institutions including the Library of Congress and the Smithsonian, the Internet Archive is working to preserve a record for future generations.

The ALA and Internet Archive submit this brief because open and free access to literature and other writings and media has long been considered essential to education and to the maintenance of an open society. With their expansive digital collections, traditional libraries and the Internet Archive host a variety of digital material that people have a legal right to view without fear that their beliefs, interests, or curiosities will be exposed to government actors.

In the context of bricks-and-mortar libraries, that right of privacy is well established: almost every state has privacy laws requiring libraries to keep user records and reading lists confidential absent a court order.[2] People have an equally important interest in being able to privately view legally permissible material on the Internet—whether that be a political manuscript like *The Communist Manifesto*, religious writings such as the Bible or Quran, or

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[2] *See* ALA, State Privacy Laws Regarding Library Records, http://www.ala.org/offices/oif/ifgroups/stateifcchairs/stateifcinaction/stateprivacy. Federal law also restricts "video tape services providers" from disclosing information identifying people who request or obtain videos. 18 U.S.C. § 2710.

medical texts discussing treatment for particular diseases or mental illnesses. These and millions of other texts are now available digitally to people with smartphones from numerous sources, including library websites, the Internet Archive, private suppliers of e-books such as Amazon.com, and individual websites. Millions of Americans read books on their phones, which can often hold thousands of books—all of which would be accessible to a law enforcement officer exploring the device. The ALA and the Internet Archive share an interest in protecting readers' right to view this type of material privately, without the risk that law enforcement officers will conduct a suspicionless search of a person's entire electronic library merely because he or she is arrested while carrying a phone.

SUMMARY OF ARGUMENT

Under this Court's precedents, while police could seize a key found in an arrestee's pocket as a search incident to arrest, they could not use that key to enter a home and search the arrestee's personal library. Even carrying out an arrest *in* a home does not license law enforcement to conduct a suspicionless search of every volume in the home library. Today's personal libraries are portable: they can fit on a smartphone, and a smartphone can fit in a pocket in a way that a shelf of books never could. But the contents of those libraries are no less private.

The Constitution affords the strongest possible protection to Americans' right to engage in intellectual inquiry privately and on their own terms. What Americans are reading is ordinarily none of the government's business; this Court has long accepted

"the right to be free from state inquiry into the contents of [one's] library." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). This case threatens that principle, because it allows police officers to peer into the contents of a person's entire personal library using a device that happens to be found on that person during an arrest.

Given the strong privacy interests implicated by any search of a smartphone, no exception can be justified to the Fourth Amendment's customary requirements for a search of "persons, houses, papers, [or] effects": individualized suspicion and a warrant issued by a neutral magistrate. Smartphones pose no danger to officer safety, and the clumsy expedient of a manual search is hardly necessary to prevent the conscious destruction of evidence. This Court has refused to countenance a search of a locked footlocker incident to arrest. A smartphone provides access to a space more private than any footlocker, and can store many footlockers' worth of private reading material.

Countenancing a suspicionless search like those at issue here will authorize police to use this new investigative technique to gain access to a plethora of private, sensitive information. Police have already shown that they will review private electronic data, ranging from web browsing history to music files, the moment they are allowed to conduct a suspicionless search of a computer. Smartphones are *personal* computers in every sense of the word: if every arrest of a person with a smartphone—a population including more than half the adults in the United States—allows police officers to rummage painstakingly and intrusively through the contents of personal librar-

ies, the loss of constitutionally protected privacy will be great indeed.

ARGUMENT

The Framers held the contents of a person's library sacrosanct—at the very core of the Constitution's protection for the people's "papers and effects." Today a majority of Americans carry in their pockets or pocketbooks the equivalent of an entire library—a library so capacious that for much of our history it would have been impossible to assemble in one place, much less in a pocket. Smartphones are the repository of Americans' private thinking: they contain and record the books we read, the websites we browse, and the conversations we have with friends and intimates. And they retain this recorded data indefinitely. Allowing a police officer making a routine arrest free rein to rummage through massive quantities of private data works a profound intrusion into what the Constitution regards as the most private, most protected sphere of all. None of the considerations underlying the search-incident-to-arrest doctrine can justify giving police that license to rummage. If this Court does not put a stop to it, law enforcement has every incentive to use that investigative technique aggressively.

I. A Person's Reading Material Is Quintessentially Private

"[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Board of Ed. v. Pico*, 457 U.S. 853, 867 (1982). Since the Founding, the freedom to read whatever lawful material one chooses has been central not just to the

Constitution, but to the very notion of American self-government: "[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *Id.* (quoting 9 Writings of James Madison 103 (G. Hunt ed. 1910)).

Because "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds," this Court has long recognized "the right to be free from state inquiry into the contents of [one's] library." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). The freedom to read necessarily includes the ability to do so without exposing one's reading selections to the government. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (striking down statute that required citizens who wished to receive "communist political propaganda" to reveal their identities before being able to receive these expressive materials); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1052-53 (Colo. 2002) ("[T]he First Amendment embraces the individual's right to . . . read whatever books she wishes to, without fear that the government will take steps to discover which books she buys, reads, or intends to read.").

Government scrutiny of reading choices creates an unacceptable "deterrent effect" on free inquiry. *Lamont*, 381 U.S. at 307; *United States v. Rumely*, 345 U.S. 41, 57-58 (1953) (Douglas, J., concurring) ("When the light of publicity may reach any student, any teacher, inquiry will be discouraged."). Just as the people have a right to speak anonymously, *see, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *Talley v. California*, 362 U.S. 60, 64 (1960), they have the corresponding right to receive speech anonymously. *See, e.g., Amazon.com LLC v.*

Lay, 758 F. Supp. 2d 1154, 1167 (W.D. Wash. 2010) ("Citizens are entitled to receive information and ideas through books, films, and other expressive materials anonymously."); *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 572 (W.D. Wis. 2007) (holding that government could not obtain identities of people who bought books because "customers who bought used books from [seller] through Amazon do have a cognizable First Amendment right"); *see also In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F. Supp. 2d 11, 17, 21 (D.D.C. 2009) (denying motion to compel production of information on customers who purchased movies; "the expressive materials being investigated are presumptively protected by the First Amendment and [the company's] customers have a correlative right to receive that information anonymously").

Reading choices thus are at the heart of the personal privacy that the Fourth Amendment guarantees. The Fourth Amendment was drafted, in part, as a response to officers of the King who, acting pursuant to general warrants, searched citizens' book collections. *See Wilkes v. Wood*, 98 Eng. Rep. 489 (1763) (several of the King's officers seized all of Wilkes's books and papers with the intent of finding anti-government pamphlets); *Entick v. Carrington*, 19 Howell's State Trials 1029 (C.P. 1765) (officers entered Entick's home and seized his personal "books and papers" in their search for "very seditious papers"). Those "celebrated cases . . . profoundly influenced the Founders' view of what a 'reasonable' search entailed." *City of W. Covina v. Perkins*, 525 U.S. 234, 247 (1999) (Thomas, J., concurring); *see also* Akhil Reed Amar, *The Fourth Amendment, Bos-*

ton, and Writs of Assistance, 30 Suffolk U. L. Rev. 53, 77 (1996) (noting that the words of the Fourth Amendment "seem to track *Wilkes* and *Entick*").

The constitutional protection of private correspondence is well established, *see, e.g.*, *Weeks v. United States*, 232 U.S. 383, 393 (1914), and private reading material is, if anything, more personal and more intimate in nature: a person may read a book, a political pamphlet, or a website in complete solitude, and complete privacy. Indeed, some reading choices—including many offered by *amici* in their traditional and electronic libraries—call for the utmost privacy protection. People may read to explore controversial ideas, such as those contained in the *Communist Manifesto* or *Mein Kampf*. Or they may read to better understand themselves, including aspects of human sexuality that are deeply personal and private. *Cf., e.g.*, *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (holding that "[plaintiff's] sexual orientation was an intimate aspect of his personality entitled to privacy protection"); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (concluding that "the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism"). Whatever the reason, the choice remains the individual's to make, free from the government's gaze. That expectation of privacy is not just "reasonable," in Fourth Amendment parlance, but essential.

II. Searches Incident To Arrest Do Not Extend To Classically Private Zones Implicating No Risk To Officer Safety Or Evidence Preservation

The federal and state governments in these cases submit that a lawful arrest grants the police access to *anything* on the arrestee's person, no matter how grave the intrusion on privacy rights or how attenuated the connection to the arrest. The search-incident-to-arrest doctrine does not extend so far. As this Court has repeatedly held, an arrest is not an unlimited license to search. Rather, the search-incident-to-arrest doctrine takes account of, and is limited by, "Fourth Amendment values" of personal privacy. *United States v. Chadwick*, 433 U.S. 1, 13 n.8 (1977). Nothing in this Court's cases requires it to overlook the drastic loss of personal privacy that permitting suspicionless searches of smartphones would create. A smartphone functioning as an e-reader is a powerful, portable tool not just of communication, but of free inquiry. Protecting that tool against arbitrary search serves the Fourth Amendment's role "safeguarding not only privacy . . . but conscience and human dignity and freedom of expression as well." *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (citation and internal quotation marks omitted).

The Fourth Amendment "protect[s] personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966); *see also McDonald v. United States*, 335 U.S. 451, 453 (1948) ("[The Fourth Amendment] marks the right of privacy as one of the unique values of our civilization . . . ."). The warrant require-

ment is a key safeguard of those privacy rights. *McDonald*, 335 U.S. at 455-56 ("The presence of a search warrant serves a high function. . . . It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.").

Searches presumptively require a warrant; searches without a warrant are exceptions to the norm. The government's authority to conduct a warrantless search incident to arrest, therefore, "has always been considered to be a strictly limited right." *Chimel v. California,* 395 U.S. 752, 759 (1969). The limitation reflects the importance of privacy rights. For a search to be permissible, the government's legitimate justification must outweigh the "intrusion on the individual's Fourth Amendment interests." *Maryland v. Buie*, 494 U.S. 325, 331 (1990). Privacy interests thus help the Court define the boundary between a permissible and impermissible search incident to arrest.

"[S]imply because" a person has been arrested, and thus "some interference with [his] privacy and freedom of movement has lawfully taken place," does not mean that "further intrusions should automatically be allowed." *Chimel*, 395 U.S. at 766 n.12. Rather, this Court has examined "the invasion of privacy that results" from a search incident to arrest, and whether that invasion is sufficiently justified to be reasonable "despite the absence of a warrant that the Fourth Amendment would otherwise require." *Id.*

Governmental interests related to "officer safety and evidence preservation," *Arizona v. Gant*, 556 U.S. 332, 337 (2009), can justify some searches incident to arrest. *See United States v. Robinson*, 414 U.S. 218, 234 (1973) (discussing the "justification or reason for the authority to search incident to a lawful arrest"); *New York v. Belton*, 453 U.S. 454, 461 (1981) (lawful arrest "justifies the infringement" of arrestee's privacy interest). But those interests must be balanced against the personal privacy interest at the core of the Fourth Amendment. *Gant*, 556 U.S. at 335.

Thus, for instance, the Court refused to countenance a search of an entire home incident to an arrest. *Chimel*, 395 U.S. at 767-68. The search created an additional "intrusion" on personal privacy, the Court explained, and not a "minor" one. *Id.* at 766 n.12. It was acceptable to search an arrestee's "person and the area 'within his immediate control,'" but there was no "comparable justification" for searching in other rooms in the arrestee's house or "for searching through all the desk drawers or other closed or concealed areas in that room [where the arrest occurred]." *Id.* at 763. Private papers are supposed to remain private whether or not they are in the same house as an arrestee. *See id.* at 767-68. So too here: "it is small consolation to know that one's papers are safe only so long as one [does not carry them]." *Id.* at 768 (quoting *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (L. Hand, J.)).

Similarly, the Court refused to allow a search incident to an arrest to extend to a locked footlocker. *Chadwick*, 433 U.S. at 14-16 & n.10. Luggage is "not

open to public view"; its contents are kept private, and for that reason government agents could not open the footlocker until they could get a warrant. *Id.* at 14. The defendants' "privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest." *Id.* at 16 n.10. So too with the passenger compartment of a car, not to mention "every purse, briefcase, or other container within that space." *Gant*, 556 U.S. at 345.

The federal government submits that those decisions are distinguishable because they involved searches *beyond the person* incident to arrest. *E.g.*, U.S. Br. 13, 21-23. That arbitrary distinction (which apparently would treat "persons" differently from "papers and effects") is one without any real difference. But even if it made sense to declare an arrestee's "person" subject to fewer limitations, that rationale would not apply to the contents of a phone in the arrestee's pocket. As discussed below, a smartphone is far more than a physical object; it is a tool for storing, searching, and viewing incredible amounts of data. It is a sizeable chunk of the arrestee's personal papers, reduced to electrons and "not open to public view." It can carry more books than Chadwick's locked footlocker could. It stands to reason that it should receive equivalent protection.

Allowing the search-incident-to-arrest doctrine to override the privacy interest in access to a smartphone would impair the "central concern underlying the Fourth Amendment"—namely, "the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345. To allow a search in that cir-

cumstance "creates a serious and recurring threat to the privacy of countless individuals." *Id.*

III. Modern Smartphones Store A Trove of Personal Reading Material And Other Private Information That Is Accessible During A Routine Search

If a person were arrested while carrying a key to his personal library of 6000 books, including his highlights in the books and notes relating to the books, there would be no constitutional basis to search those books incident to arrest. Yet by permitting a police officer to search today's smartphone upon arrest, that is exactly what this Court would be permitting. A smartphone is a portal to a person's entire electronic library; in fact, for millions of Americans, it *is* their primary library. Searching a smartphone would give the officer access to many times more books than an arrestee could ever carry in his pocket. And because of the way smartphones work, they often contain not just what the arrestee is reading *today*, but also what he read yesterday, and perhaps years ago—his entire reading history. The mere fact of an arrest does not justify allowing law enforcement to rummage through that massive quantity of often deeply personal data.

Using smartphones, tablets, and dedicated e-readers, millions of Americans now do some or all of their reading on small, portable electronic devices—and the numbers are rapidly increasing.[3] Numerous

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[3] Lee Rainie et al., Pew Internet & Am. Life Project, *The rise of e-reading* (Apr. 4, 2012), http://libraries.pewinternet.org/2012/04/04/the-rise-of-e-reading/ (21% of American adults read an e-book in the past year); Bob Minzesheimer, *The changing world*

programs—known as apps—allow people to read e-books on their smartphones.[4]

Millions of e-books are available for people to download onto their smartphones.[5] People can also borrow e-books: traditional public libraries started lending e-books in the 1990s,[6] and the numbers have greatly increased since then as libraries make digital books (and often e-readers themselves) available to borrowers.[7]

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of book reading, USA Today, Oct. 6, 2013, http://www.usatoday.com/story/life/books/2013/10/06/e-books-reading/2877471/ (noting two- and three-fold increases in e-reader and tablet ownership between 2011 and 2013); *see also* Aaron Smith, Pew Research Internet Project, *Smartphone Ownership 2013* (June 5, 2013) http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/ (percentage of American adults who own a smartphone has increased from 35% in 2011 to 56% in 2013).

[4] *See, e.g.*, Android Authority, *Top 5 eBook Reader Apps for Android Phones/Tablets*, http://www.androidauthority.com/top-5-ebook-reader-apps-for-android-phonestablets-44253/; Mashable, *5 Fantastic Free iPhone E-book Reader Apps* (Apr. 6, 2010), http://mashable.com/2010/04/06/free-iphone-ebook-readers/.

[5] iBooks, http://www.apple.com/ibooks (over 2 million books at the iBooks Store, many of them free); Google Play Books, https://play.google.com/store/apps/details?id=com.google.android.apps.books ("Choose from millions of books," which can be read on Android smartphones).

[6] Doris Small Helfer, *E-Books in Libraries: Some Early Experiences and Reactions*, Searcher (Oct. 1, 2000), http://www.highbeam.com/doc/1G1-66217098.html.

[7] Barbara A. Genco, *It's Been Geometric! Documenting the Growth and Acceptance of eBooks in America's Urban Public Libraries*, World Library And Information Congress: 75th IFLA General Conference and Council (July 24, 2009); *Libraries Connect Communities: Public Library Funding & Technology Access*

The growing use of smartphones to read e-books means that the mere fact of an arrest threatens to expose to government agents wide-ranging aspects of people's reading habits—including what books they read, what parts of books they thought interesting or intellectually provocative, what thoughts they had about books. Smartphones now have 64 gigabytes of storage space, enough to fit more than 50,000 copies of War and Peace, so a person's entire library can be accessible with a few clicks using a tiny device.[8] Equally problematic is that readers' interaction with their books is also easy for police officers to see: e-books allow users to take notes, highlight text, or clip what they read.[9] Thus, an officer thumbing through a person's smartphone would see not only the person's books, but what passages the reader thought were compelling or important and what notes the reader took.

The technology works seamlessly across devices, so a person's reading habits (as well as those of a

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Study 2011-2012, American Libraries (Summer 2012) Digital Supplement at 6 (as of 2012, over 76 percent of libraries offer access to e-books, and 39 percent allow patrons to borrow e-book readers).

[8] *See* WAR AND PEACE, Project Gutenberg, The Internet Archive, https://archive.org/details/warandpeace030164mbp (file size for "epub" version); *see also How Many Books Can a Kindle Hold?*, http://www.ehow.com/info_12223761_many-books-can-kindle-hold.html (estimating that an 8 gigabyte e-reader introduced in March 2012 can store about 6,000 books).

[9] Amazon, *Customize Your Reading on Kindle DX*, http://www.amazon.com/gp/help/customer/display.html?nodeId=200375680 (Amazon, *Customize Your Reading*) ("Kindle allows you to add comments, make notes, and mark up passages just as you might in a printed book.")

spouse or child) may be exposed even if no one was reading the book on the seized smartphone.[10] Reading can be synchronized across devices, including across a family's shared devices, so someone who read part of a book at home on a tablet computer can continue reading on a smartphone or note text for a family member to read—but so could an officer who, upon searching the phone, would be able to see what the person read at home, as well as highlights and notes the person took.[11]

The officer searching the phone could do the same with the user's audio and video files, which are growing in popularity as alternative, smartphone-friendly ways to consume intellectual content. The Internet Archive and other libraries offer numerous forms of audio and video content that can reside on smartphones, including audiobooks, radio programs, podcasts, music, documentaries, and other films.[12]

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[10] iBooks, http://www.apple.com/ibooks ("[Y]ou can read one of your favorites on your iPhone during your morning commute, page through a few chapters on your Mac later in the day, and pick up right where you left off on your iPad at bedtime.").

[11] iBooks, http://www.apple.com/ibooks ("When you take notes, highlight passages, or create bookmarks, iCloud pushes them to all your devices automatically. And it remembers which page you're on, so you can pick up right where you left off."); Amazon, *Customize Your Reading* ("When you open the title on any registered device, you'll be right where you were the last time you read and your annotations will be included.").

[12] *See, e.g.*, Internet Archive, *Audio Archive*, https://archive.org/details/audio; Internet Archive, *Moving Image Archive*, https://archive.org/details/movies;, N.Y. Pub. Library, *Audio & Video Produced by NYPL*, http://www.nypl.org/voices/audio-video; Multnomah County Library, *E-books, streaming media and downloadables*, https://multcolib.org/ebooks-and-downloadables (providing service that "enables li-

Audiobooks, Internet radio, podcasts, and other multimedia sources are entitled to the same protection for private intellectual inquiry as words on the printed page: they often allow people to see and hear different perspectives, explore controversial ideas, and learn new information, using a medium far more friendly to instant, widespread dissemination than the printing of a traditional book.

A person's expansive digital library is one of the many private things that might be stored on a smartphone, which contributes to the sentiment that "[f]ew things are more precious, intimate and personal than the data on your smartphone."[13] "Vast amounts of private, personal information can be stored and accessed in or through these small electronic devices." *Smallwood v. State*, 113 So.3d 724, 731-32 (Fla. 2013). Smartphones are thus not much different from personal computers in terms of the types of information that they possess. *United States v. Flores-Lopez*, 670 F.3d 803, 805 (7th Cir. 2012) ("Judges are becoming aware that a computer (and remember that a modern cell phone is a computer) is not just another purse or address book. . . . computers hold so much personal and sensitive information

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brary patrons to watch and listen to a wide selection of movies, television shows, educational and instructional videos, documentaries and music through a browser, smartphone or tablet").

[13] Mat Honan, *Break Out a Hammer: You'll Never Believe the Data 'Wiped' Smartphones Store*, Wired.com (Apr. 1, 2013, 6:30 AM), http://www.wired.com/gadgetlab/2013/04/smartphone-data-trail/all/ ("It tracks your location and logs your calls. It's your camera and your mobile banking device; in some cases it is a payment system in and of itself that knows what you bought and when and where and for how much.").

touching on many private aspects of life."); *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008) ("[C]ell phones contain a wealth of private information, including emails, text messages, call histories . . . A cell phone is similar to a personal computer that is carried on one's person").[14] Indeed, the pure volume of information that a smartphone can store is remarkable, and rivals that of computers.[15] Moreover, with the convenience that a phone affords, and the exponential growth and increasing utility of downloadable applications,[16] individuals may want

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[14] Tim Bajarin, *Why Your Smartphone Will Be Your Next PC*, TIME Tech (Feb. 25, 2013), http://techland.time.com/2013/02/25/why-your-smartphone-will-be-your-next-pc/ ("The basic idea here is that the smartphone itself is your PC and then docks into the back of either a portable screen or some type of laptop shell . . . Keep in mind that the smartphone has all of your personal data, personal user interface and personal apps"); John C. Dvorak, *Should We Consider the Smartphone a Computer?*, PCmag.com (Dec. 4, 2012), http://www.pcmag.com/article2/0,2817,2412850,00.asp ("I think the argument can be made that the smartphone is in the same market as the desktop computer").

[15] Charles E. MacLean, *But Your Honor, A Cell Phone Is Not A Cigarette Pack: An Immodest Call For A Return To The Chimel Justifications For Cell Phone Memory Searches Incident To Lawful Arrest*, 6 Fed Cts. L. Rev. 37, 42 (2012) ("A cell phone with just one gigabyte of memory can store over 64,000 pages of Microsoft Word text, or over 100,000 pages of e-mails, or over 675,000 pages of text files. . . . modern cell phones are capable of storing at least sixty-four gigabytes of private information equaling four million pages of Microsoft Word documents").

[16] Reportbuyer.com, Press Release, *Mobile Data and Applications: State of the Industry, Market Prospects, and Forecast 2013-2018* (Feb. 24, 2014), http://www.marketwatch.com/story/mobile-data-and-applications-state-of-the-industry-market-prospects-and-forecast-2013-2018-2014-02-24 ("Mobile applications continue an explosive growth phase. . . . Mobile apps are

to put more private information on their smartphone than even on their home computer.[17]

In many ways, storing and consuming media on a smartphone offers increased privacy for users over physical media. Unlike hardcopy books, records, tapes, CDs, or DVDs, digital books, audio, and video on a smartphone need not be hidden when a person has visitors. And digital media, especially e-books, can be experienced in a crowded public setting with-

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more than just a direct to consumer phenomenon as leading enterprise companies take mobile apps seriously. . . . [T]oday leading companies are focused on compelling mobile apps."); *see, e.g.*, Elizabeth Stawicki, *Smartphones Help Bridge Gaps in Electronic Medical Records*, NPR (Jun. 17, 2013, 4:00 AM), http://www.npr.org/2012/06/17/192596386/smartphones-help-bridge-gaps-in-electronic-medical-records ("Hospitals, doctors and Medicare are making it easier for people to have access to their own health records. Some [mobile] app developers have even created ways to have health information available even on a smartphone.")

[17] *See* Adam Pash, *Your Smartphone Is a Better PC than Your PC Ever Was or Will Be*, Lifehacker.com (Nov. 4, 2010, 9:15 AM), http://lifehacker.com/5681573/your-smartphone-is-a-better-pc-than-your-pc-ever-was-or-will-be ("Smartphones are PCs . . . only they're more personal . . what's more personal than a gadget that . . . comes with you wherever you go, knows where you are, is always connected to the internet, handles every form of electronic communication short of Morse code . . . And so on."); Sebastian Anthony, *There can only be one: Smartphones are the PCs of the future*, ExtremeTech (Aug. 23, 2012), http://www.extremetech.com/computing/134868-there-can-only-be-one-smartphones-are-the-pcs-of-the-future ("In a few years, everything you do on your laptop today will be achievable on a smartphone. So why continue to use a laptop? . . . In a world where smartphones rule supreme, and extra connectivity is provided by docking stations, there really is no hope for the PC. If it helps, you can simply think of a smartphone as a really small PC.").

out drawing the attention of snoops. In these ways, a person's digital library is more private than a physical library in his or her home.

The extraordinary capabilities of modern smartphones encourage users to expose every facet of their lives to their devices. With the enhanced productivity and connectedness comes increased risk: if the information stored on the individual's phone may be accessed by a police officer incident to every arrest, the privacy interests of individuals will be severely compromised. Virtually every single activity on a smartphone is logged and stored. Someone looking at a smartphone can see a person's text messages, emails, and internet search and browsing history.[18] Just as books read at home can show up on a smartphone, searches that a person runs from a home computer may show up in the search history on his or her phone.[19] Even more alarming, regardless of

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[18] *See, e.g.*, Eva Galperin, *How to Remove Your Google Search History Before Google's New Privacy Policy Takes Effect*, Electronic Frontier Foundation (Feb. 21, 2012), https://www.eff.org/deeplinks/2012/02/how-remove-your-google-search-history-googles-new-privacy-policy-takes-effect; Peter Eckersley, Seth Schoen, Kevin Bankston, and Derek Slater, *Six Tips to Protect Your Search Privacy*, Electronic Frontier Foundation (Sept. 14, 2006), https://www.eff.org/wp/six-tips-protect-your-search-privacy ("Google, MSN Search, Yahoo!, AOL, and most other search engines collect and store records of your search queries."); Scott Orgera, *How to Manage Your Browsing History in Safari for the iPhone*, http://browsers.about.com/od/allaboutwebbrowsers/ss/iphonehistory.htm ("The Safari Web browser on your iPhone keeps a log of Web pages that you have visited in the past.").

[19] Frank McPherson, *Access Your Google Search History On A Smartphone*, Social Times (Aug. 3, 2010, 9:11 PM), https://socialtimes.com/access-your-google-search-history-on-a-

whether an individual wants to record the information or even knows that the information is being stored, more likely than not, that information can be found by someone who gains access to the individual's phone.[20] Digital books are just one important example among the numerous categories of personal material that can easily be exposed.

IV. Police Are Likely To Examine Private Information While Searching A Smartphone

If this Court approves the routine search of smartphones incident to arrest, the privacy impact will be immediate and dramatic. That is not a prediction; it is a certainty. Evidence of the sort available on smartphones is commonly used by the gov-

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smartphone_b47793 ("If you have a Google account, and sign in to it from a web browser, then all of the searches that you perform in Goggle are stored by Google.").

[20] For example, even after a modern cell phone (albeit not the newest version) was disposed of, and its personal data mostly deleted, a mobile forensics expert was able to find hundreds of phone numbers from a contacts database and "a list of nearly every Wi-Fi and cellular access point the phone had ever come across – 68,390 Wi-Fi points and 61,202 cell sites. . . . Even if the phone had never connected to any of the Wi-Fi access points, iOS was still logging them, and [the forensics expert] was able to grab them and piece together a trail of where the phone had been turned on." Honan, *supra*; *see also How selling on your smartphone leaves you vulnerable to fraud and blackmail: How personal information stored on devices can be easily accessed by new owners*, Daily Mail (U.K.), Feb. 6, 2014, http://www.dailymail.co.uk/news/article-2553412 (reporting that "[p]hotos, passwords and credit cards are just some of the intimate details" that smartphone owners "unwittingly" store on their devices, and "can be easily accessed").

ernment in criminal cases of all kinds, and investigators already undertake frequent warrantless searches of electronic devices where courts have allowed it,.

A. Law Enforcement Officers Already Seek And Use Electronic Evidence

Law enforcement officers are trained to view electronic devices as a potent source of potential evidence. If permitted, they will fully exploit any authorization to search smartphones without individualized suspicion or a warrant.

Reference materials for first responders advise them to be zealous in collecting electronic devices, including smartphones, as evidence. In a 2008 guide for "First Responders," the Justice Department's National Institute of Justice advised that "handheld devices such as mobile phones [and] smart phones . . . may contain software applications, data, and information such as documents, e-mail messages, Internet browsing history, Internet chat logs and buddy lists, photographs, image files, databases, and financial records that are valuable evidence in an investigation or prosecution." Nat'l Institute of Justice, U.S. Dep't of Justice, *Electronic Crime Scene Investigation: A Guide for First Responders* 8 (2d ed. 2008). When securing a scene, first responders are advised to "[i]mmediately secure *all* electronic devices, including personal or portable devices." *Id.* at 15. And mobile devices are listed as "potentially valuable digital evidence" for every category of crime addressed by the guide. *Id.* at 35-46.

The Secret Service and the Federal Bureau of Investigation have similarly advised first responders of the value of smartphone evidence for investigations

of all sorts. *See* U.S. Secret Service, U.S. Dep't of Homeland Security, *Best Practices for Seizing Electronic Evidence: A Pocket Guide for First Responders* 6, 12-14 (3d ed. 2007); Federal Bureau of Investigation, U.S. Dep't of Justice, *Digital Evidence Field Guide: What Every Peace Officer Should Know* 4-6 (1.1 ed. 2007).

Further driving investigators to search electronic devices, a growing number of criminal cases have involved the sort of evidence available on smartphones. In a 2010 California case, the jury was told that the defendant had "viewed the Military Library portion" of a website, "which involved silencers, body armor, explosives, and the like" and which "listed several books about silencers." *People v. Mares*, No. A121521, 2010 Cal. App. Unpub. LEXIS 871, at *9-10 (Cal. Ct. App. Feb. 5, 2010). The *Mares* jury also learned that the defendant had visited a website about videos depicting various forms of extreme violence—violence entirely unrelated to the crime at issue. *Id.* Other evidence of internet search results has also been used in prosecutions. *See Davidson v. State*, 249 S.W.3d 709, 716 (Tex. Ct. App. 2008) (jury learned that the defendant had conducted an internet search for "decomposition of a body in water"); *United States v. Graziano*, 558 F. Supp. 2d 304, 314-15 (E.D.N.Y. 2008) (investigators found internet search for "arson rico laws"). So has evidence about what people looked at on online maps. *See People v. Zirko*, 976 N.E.2d 361, 373 (Ill. App. Ct. 2012) (defendant searched MapQuest.com for directions to the crime scene); *State v. Cooper*, 747 S.E.2d 398, 402 (N.C. Ct. App. 2013) (defendant used Google Maps to "zoom[] in on the exact spot" where the victim's body was later found). And the jury in a Florida case

learned about a song that the defendant downloaded on the day that his wife was killed. *Barber v. State*, 4 So. 3d 9, 10-11 (Fla. Ct. App. 2009) (the Guns N' Roses song "Used to Love Her (But I Had to Kill Her)").[21]

As an increasing number of people read books on their smartphones, law enforcement officers are likely to examine this information to see what books arrestees have been reading to gain evidence of criminal activity. Police already do that with printed books. *See George v. Rehiel*, 738 F.3d 562, 586 (9th Cir. 2013) (college student detained by Transportation Security Administration and questioned about Arabic flash-cards and a book "critical of United States foreign policy" from his luggage); *United States v. Seljan*, 547 F.3d 993, 998 (9th Cir. 2008) (en banc) (police seized a "fiction book about pedophilia and incest" in connection with a sex-crimes prosecution); *Tattered Cover*, 44 P.3d at 1061 (law-enforcent officials served bookstore with an administrative subpoena demanding to know every book a particular suspect had ever ordered); *Simmons v. State*, 912 P.2d 217, 220 (Nev. 1996) (police seized a book about Satanism and read portions of it at defendant's murder trial). For every example in a reported opinion,

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[21] Other cases—particularly child-pornography cases—involve electronic material that is itself contraband. *See, e.g., United States v. Cotterman*, 709 F.3d 952, 957-58 (9th Cir. 2013). *Amici* do not host contraband, but officers searching for it might well come across private and personal material of the sort that *amici* do host. And the possibility of discovering such contraband gives investigators another reason to search electronic devices eagerly, and thereby increases the chance that investigators will discover the sort of "research" evidence discussed above that does implicate *amici*'s interests.

it is likely that there are far more instances in which police rummaging through someone's reading material find no useful evidence—but the infringement on privacy has already occurred.

B. Investigators Already Undertake Warrantless Searches of Electronic Devices Whenever Allowed

Law enforcement officers are entirely capable of finding private and personal information on electronic devices. In *United States v. Brown*, for example, a detective executing a warrant saw a computer and quickly "look[ed] at the search history for Google, the site to which it was opened." 374 F. App'x 927, 937 (11th Cir. 2010). Similarly, Customs officers often examine files on electronic devices. *See People v. Endacott*, 79 Cal. Rptr. 3d 907, 908 (Ct. App. 2008) (Customs officer regularly powers up laptops and looks for pictures and video); *United States v. Kyle*, No. CR 10-00245-1 JSW, 2011 U.S. Dist. LEXIS 6791, at *2-3 (N.D. Cal. Jan. 19, 2011) (customs officer conducted "a media examination" of cell phone and laptop).

Given the extraordinary growth in the use of smartphones and correspondingly increasing role of electronic evidence, the Court can expect an explosion of warrantless smartphone searches if it upholds them here—such searches will be standard operating procedure. And the increase would reflect searches that, under the law in force today, cannot be conducted without individualized suspicion and a warrant. Investigators hoping to find evidence of the sort identified above already exploit any opportunity to search electronic devices. As discussed above, the

wealth of information available on a smartphone makes those devices much like a modern computer, but more personal, because people carry the devices with them everywhere they go. As a result, while many of the cases discussed above involved warrants, investigators also take advantage of exceptions to the warrant requirement to conduct warrantless searches of electronic devices wherever courts have permitted them.

If this Court announces a rule allowing a suspicionless search of every cell phone that is found on an arrestee's person, law enforcement will not pass up the opportunity. The result will be precisely the sort of suspicionless "rummaging" that this Court's cases forbid, and the impact on privacy will be severe.

CONCLUSION

The judgment in *Riley* should be reversed, and the judgment in *Wurie* should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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UNITED STATES OF AMERICA, PETITIONER,
v.

BRIMA WURIE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF SOUTHWESTERN LAW STUDENT ANNA ARAN, AND PROFESSORS NORMAN M. GARLAND AND MICHAEL M. EPSTEIN, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Respondent. Norman M. Garland is a professor of law at Southwestern Law School. He teaches Evidence, Constitutional Criminal Procedure, Trial Advocacy, and Advanced Criminal Procedure. He writes about Evidence and Criminal Procedure.

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[1] All parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. This brief was researched and prepared in the Amicus Project Practicum at Southwestern Law School.

Amici have no interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the Court's interpretation of the Fourth Amendment.

SUMMARY OF THE ARGUMENT

Once a police officer seizes a mobile phone in a search incident to arrest, and thus secures the mobile phone and any evidence that it could contain, the police officer should be required to obtain a warrant to search the mobile phone. This suggested rule is based upon the First Circuit's holding in the instant case. Additionally, this rule could be flexible and include electronic devices other than mobile phones that have capabilities similar to mobile phones. There are several benefits to adopting this rule; the rule is clear, flexible enough to support technological advances, easy for police officers to follow, and protects individuals' privacy rights.

The mobile phone has changed how much private and highly sensitive information individuals can carry on their person. As technological advances change Americans' lives, in turn, the Fourth Amendment's guarantee of privacy will need to adapt to technological advances. Mobile phones are now a prevalent, integral part of modern life. As such, mobile phones should not be subject to the same search and seizure rules as cigarette packages and paper bags.

Americans do not use mobile phones just for telephonic communication. Mobile phones can contain anything from emails to bank or medical

records, and in vast quantities. Moreover, individuals can use mobile phones to interact with their homes. Thus, a search of a mobile phone can turn into a search of a home.

Fourth Amendment rules should accommodate police officers' needs with individuals' Fourth Amendment interests. A rule that requires police officers to obtain a warrant before searching a seized mobile phone or other electronic device achieves that balance. The suggested rule is easy for police officers to follow, whereas a narrower rule that protects only the type mobile phone at issue could cause police confusion. A broader, more permissive rule that allows warrantless mobile phone searches as long as the mobile phone was seized incident to arrest values police officer convenience over individuals' reasonable expectations of privacy. By contrast, the suggested rule would both protect individuals' privacy expectations and allow police officers to search electronic devices under exigent circumstances.

ARGUMENT

I. FOURTH AMENDMENT JURISPRUDENCE MUST ADAPT TO MOBILE PHONES' CAPACITY TO CONTAIN A LARGE VOLUME OF SENSITIVE, PERSONAL, AND PRIVATE INFORMATION

A. Technological Advances Affect Fourth Amendment Jurisprudence

To protect individuals' private lives in the modern era, Fourth Amendment jurisprudence must adapt to

technology. *See In re United States for an Order Authorizing the Release of Historical Cell-Cite Info.*, 809 F. Supp. 2d 113, 127 (E.D.N.Y. 2011). Technology can simultaneously grant individuals easy access to personal information and shrink their Fourth Amendment privacy rights. As Justice Scalia noted in *Kyllo*, "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). Mobile phone technology has made "drastic" advances in the last thirty years. *In re United States for an Order Authorizing the Release of Historical Cell-Cite Info.*, 809 F. Supp. 2d at 127. Fourth Amendment jurisprudence should also "evolve to preserve [mobile] phone user's reasonable expectation of privacy . . . ." *Id.*

B. Most Americans Own Mobile Phones And Carry Them On Their Person

The Court's holding in this case will directly impact many Americans because most Americans own mobile phones and carry them on their person. As this Court has observed, "everyone over the age of three seems to carry a [mobile] phone . . . ." *Abuelhawa v. United States*, 556 U.S. 816, 822 (2009) (calling a drug dealer to make a misdemeanor drug purchase is not facilitating drug distribution). As of January 2014, 90% of American adults have a mobile phone, and of those 58% own a smartphone. *Cell Phone and Smartphone Ownership Demographics*, Pew Research Center, http://tinyurl.com/ppdsm38 (last visited April 3, 2014).

Thirty years after the introduction of the DynaTAC 8000X, the first commercially available mobile phone, mobile phones are ubiquitous, multi-purpose, and can cost as little as $14.99. *United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012) (Posner, J.). Indeed, mobile phones "are [now] so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification." *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) (searching a government employee's mobile work phone was reasonable because the search was motivated by a legitimate work-related purpose and was not excessive).

The technology that was "once [an] unaffordable and impractical status symbol [is now] the primary means of telephonic communication." Devin W. Ness, *Information Overload: Why Omnipresent Technology and the Rise of Big Data Shouldn't Spell the End for Privacy As We Know It*, 31 Cardozo Arts & Ent. L.J. 925, 927-28 (2013). Many households have completely substituted landline telephones for mobile phones. Stephen J. Blumberg, Julian V. Luke, Nadarajasundaram Ganesh, Michael E. Davern & Michel H. Boudreaux, *Wireless Substitution: State-level Estimates From the National Health Interview Survey*, 2010-2011, 61 Nat'l Health Stat. Rep. 1, 1 (2012), *available at* http://tinyurl.com/9q74e4l. In 2011, wireless-only adult households ranged from as high as 44.6% (Idaho) and as low as 15.3% (Rhode Island). *Id.*

C. The Quantity And Quality Of Private Information That Mobile Phones Contain Distinguishes Them From The Traditional Containers In *Robinson* And *Ross*

Mobile phones are distinguishable from traditional containers such as *Robinson*'s cigarette package and *Ross*'s paper bag because mobile phones have the capacity to hold or grant access to a large volume of sensitive, personal, and private information. *Smallwood v. State*, 113 So. 3d 724, 732 (Fla. 2013) (quoting *United States v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011)). A mobile phone contains "not just phone numbers and call history, but also photos, videos, bank records, medical information, daily planners, and even correspondence between individuals through applications such as Facebook and Twitter." *Id.*

Mobile phones' capacity to contain private information makes them difficult for courts to categorize. Some courts place mobile phones somewhere in-between laptop computers and traditional address books. *See State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009). Other courts state that "[a] modern [mobile] phone is a computer." *United States v. Flores-Lopez*, 670 F.3d at 804.

Some courts, such as the *Diaz* court, have held that the propriety of a search incident to arrest does not turn upon the character of the item searched, or how much information the item could contain. *People v. Diaz*, 244 P.3d 501, 506-07 (Cal. 2011). The *Diaz* court relied on *United States v. Ross*, 456 U.S. 798

(1982) and *New York v. Belton*, 453 U.S. 454 (1981), which both discussed searches incident to arrest in the automobile context. *Id.* at 507. But, at the time *Ross* and *Belton* were decided, mobile phones were not commercially available and did not have modern mobile phones' capacity to store private information.

The Motorola DynaTAC 8000X was the first commercially available mobile phone. The DynaTAC 8000X was released in 1983 and cost $3,995. Patricia E. Salkin, *From Bricks and Mortar to Mega-Bytes and Mega-Pixels: The Changing Landscape of the Impact of Technology and Innovation on Urban Development*, 42/43 Urb. Law. 11, 23-24 (2011); Ness, *supra*, at 927 n.10. The DynaTAC 8000X, a "brick era" phone, was used only for communication. Brian Fling, *Mobile Design and Development* 3-5 (2009).

As the technology progressed, mobile phones were used to make phone calls, send text messages, and play simple games. Fling, *supra*, at 6. Then, in 1998's "feature phone era," mobile phones could take photographs, play music, and were Internet capable. *Id.* at 6-7. Finally, in 2002's "smartphone era" and 2007's "touch era," mobile phones "got smarter by learning from desktop computing, truly becoming personal computers . . . ." *Id.* at 10.

Thus, when the *Ross* Court held that "'[a] constitutional distinction between "worthy" and "unworthy" containers would be improper'" in the automobile context, the *Ross* Court did not consider containers with the modern mobile phone's capabilities. *People v. Diaz*, 244 P.3d at 507 (quoting *United States v. Ross*, 456 U.S. at 822). The

container at issue in *Ross* was a "'lunch-type' brown paper bag." *Ross*, 456 U.S. at 801. The *Ross* Court discussed "paper bags, locked trunks, lunch buckets, and orange crates . . . ." *Id.* at 822. None of those items are capable of containing the same type and quantity of private information as a modern mobile phone, nor are they capable of the variety of feats that a modern mobile phone can accomplish.

Likewise, *Robinson* was decided in 1973. *United States v. Robinson*, 414 U.S. 218 (1973). The container in *Robinson* was a "crumpled package of cigarettes." *Id.* at 236. A cigarette package is a physical, traditional container. Such a container's physical boundaries limit how much it can hold, as well as what it can hold. By contrast, a mobile phone can be used to access information that is not physically contained within it.

Judge William K. Sessions III's comparison of a mobile phone to the magical wardrobe in *The Lion, the Witch, and the Wardrobe* is compelling. *United States v. Mayo*, 2013 WL 5945802 (D. Vt. Nov. 6, 2013). A cigarette pack "has easily discernable limits: the container is large, but it is contained," whereas a mobile phone "is a portal to the vast cosmos that is the [I]nternet." *Id.* Judge Sessions explained that if *Robinson*'s rule applied to mobile phones, it would be akin to a search that "would extend to all of Narnia." *Id.* Thus, the quantity and quality of the information that a mobile phone can potentially hold sets it apart from traditional containers. *Schlossberg v. Solesbee*, 844 F. Supp. 2d 1165, 1168 (D. Or. 2012) (citing *United States v.*

Park, 2007 U.S. Dist. LEXIS 40596 at *8-9 (N.D. Cal. 2007)).

Furthermore, individuals can customize smartphones by downloading applications that help them manage their daily lives. These applications can contain private, personal information. For instance, a woman can download a menstrual calendar onto her phone that tracks when she has had intercourse, menstruated, and ovulated. *Menstrual Calendar Premium*, Google Play, http://tinyurl.com/cvxbyw2 (last visited April 3, 2014). Or, a parent could download an application that keeps medical records for the whole family, including x-rays, CAT scans, laboratory test results, and health insurance information. *My Medical*, iTunes, http://tinyurl.com/ mkmsn8y (last visited April 3, 2014). Or, an individual can download an application that gathers all of his or her personal finance information from checking accounts, savings accounts, and credit cards and charts the individual's spending. *Mint.com Personal Finance*, Google Play, http://tinyurl.com/ 7glpvg6 (last visited April 3, 2014).

Thus, a warrantless search incident to arrest of an individual's mobile phone or any other electronic device should not turn upon whether the device was immediately associated with the arrestee's person. A mobile phone can contain the same information as or be linked via a "cloud" to a desktop computer, but unlike a desktop computer, a mobile phone can be easily found on an individual's person. *iCloud*, Apple.com, http://tinyurl.com/63gt4mu (last visited April 3, 2014). With a broad, permissive search

incident to arrest rule, a police officer can access, via an arrestee's mobile phone, the contents of the arrestee's desktop computer without a warrant.

Recently, foreign courts have addressed police searches of mobile phones and the attendant privacy concerns. The Supreme Court of Canada recognized that mobile phones should be treated differently from other containers because of the quantity and quality of information that mobile phones can contain. *R. v. Vu*, [2013] SCC 60, para. 41, 44, 49 (Can.) (holding that if a search warrant does not specifically authorize a search of a mobile phone, the police may seize the mobile phone, but then must obtain a warrant to search the mobile phone.).

In *Vu*, the court equated modern mobile phones with computers, and distinguished both from "traditional storage receptacles." *R. v. Vu*, [2013] SCC at para. 24, 38 ("[W]hen I referred to 'computers', I include within that term the cellular telephone."). The court reasoned that comparing mobile phones to traditional containers is "unrealistic" because of the "scale and variety" of information that mobile phones can contain. *Id.* at para. 41. Unlike a cupboard, a mobile phone "'can be a repository for an almost unlimited universe of information.'" *Id.* at para. 41 (quoting *R. v. Mohamad*, [2004] 69 O.R. 3d 481, para. 43. (Can. Ont. C.A.)). Furthermore, a mobile phone, unlike a filing cabinet, allows "access to information and documents that are not in any meaningful sense at the location for which the search is authorized." *Id.* at para. 44.

Since mobile phones can contain or grant access to so much private information, *Robinson*'s permissive rule and *Ross*'s reasoning should not govern warrantless searches of mobile phones and other similar technological devices. *Robinson* and *Ross* involved containers with discernable limits. By contrast, mobile phones are containers that can access a vast quantity of personal information outside of their physical boundaries. As the Florida Supreme Court reasoned, warrantless searches should not be allowed such that a police officer may delve "into the most private and personal details of an arrestee's life without a search warrant simply because the cellular phone device [that] stores that information is small enough to be carried on one's person." *Smallwood v. State*, 113 So. 3d at 738.

D. A Rule That Allows Warrantless Searches Of Mobile Phones Allows Warrantless Searches Of Homes

A broad, permissive rule that allows warrantless searches of mobile phones incident to arrest interferes with the Fourth Amendment's bright line at the home's threshold. *Schlossberg v. Solesbee*, 844 F. Supp. 2d at 1169 (discussing an individual's privacy expectation in a digital camera); *Kyllo v. United States*, 533 U.S. at 40. Under such a rule, a police officer could search an individual's home without a search warrant by searching that individual's mobile phone incident to an arrest for a minor offense, such as jaywalking. *See United States v. Flores-Lopez*, 670 F.3d at 805-06. Such a search conflicts with the "'basic principle of Fourth Amendment law' that searches and seizures inside a

home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 473-74 (1971)).

There are several ways in which a mobile phone search could become a house search, or reveal intimate details about the home. Via applications like iCam, a police officer could view the interior of the individual's home. *United States v. Flores-Lopez*, 670 F.3d at 805-06. Thus, "[a]t the touch of a button a cell phone search becomes a house search, and that is not a search of a 'container' in any normal sense of that word, though a house contains data." *Id.*

Furthermore, for some individuals, their mobile phone functions as a "robo-home" remote control. Alexandra Chang, *6 Smartphone-Controlled Home Products*, Dwell (Sept. 9, 2013), http://tinyurl.com/dwellsmartphonehome. Smartphone applications can remotely control a home's locks, lights, appliances, motion detectors, baby monitors, and temperature controls. *Id.* Many of these applications utilize "if this then that" (IFTTT) technology. *See WeMo Switch + Motion*, Belkin, http://tinyurl.com/belkinwemoswitch (last visited April 5, 2014); *Meet Hue: You and Hue*, Philips, http://tinyurl.com/youandhue (last visited April 5, 2014). IFTTT, a third-party service, allows users to create personalized "recipes" wherein if a specified triggering condition occurs, then a certain action will follow. *About IFTTT*, IFTTT, http://tinyurl.com/aboutifttt (last visited April 5, 2014).

Shared IFTTT recipes demonstrate how individuals use their mobile phones to interface with their homes. One popular recipe sends the mobile phone user a text message if a motion detector senses motion in user's house after a specified "quiet period." *While I'm not home, let me know if any motion is detected in my house*, IFTTT, http://tinyurl.com/iftttrecipe1 (last visited April 5, 2014). Another recipe prompts a security camera to take a photograph and then email the photograph to the user whenever a specified motion sensor detects motion in the house. *Motion detected on one of the house netcams*, IFTTT, http://tinyurl.com/iftttrecipe2 (last visited April 5, 2014).

Some IFTTT recipes are designed to aid parenting. For example, there is a recipe that calls the user's mobile phone when "the teenagers have gotten into the liquor cabinet!" *Call me if the liquor cabinet opens!*, IFTTT, http://tinyurl.com/iftttrecipe3 (last visited April 5, 2014). Or, there is a recipe that will text the user's mobile phone if the noise level in a room drops below a specified level. *Hey kids! That party is getting too quiet. Make some noise down there!*, IFTTT, http://tinyurl.com/iftttrecipe4 (last visited April 5, 2014). For the safety-minded, there is a recipe that will turn the house's lights orange if a room's carbon dioxide level rises above a certain amount. *Turn your lights to orange when the room's Carbon Dioxide rises above 1000 ppm*, IFTTT, http://tinyurl.com/iftttrecipe5 (last visited April 5, 2014).

Finally, home security can be controlled via smartphone applications. ADT, with over 6.5 million

customers, is one of America's largest home and small business security providers. *About ADT*, ADT, http://tinyurl.com/aboutadt (last visited April 5, 2014). ADT was the "first security company to offer mass market home automation services." *Id.* Home automation turns ADT customers' homes into "smart homes." *Smart Home: Getting Ready For Smart Home Systems*, ADT, http://tinyurl.com/adtsmart home (last visited April 5, 2014). With their smartphones, ADT's customers can control their "home's lighting, thermostat, security, appliances and more . . . ." *Id.* Similar to iCam, ADT's smartphone application allows ADT's customers to use their mobile phones to view their home's security camera feed, arm or disarm their security system, and specify alert criteria. *Remote Home Monitoring From Your Smartphone*, ADT, http://tinyurl.com/adtremote (last visited April 5, 2014).

Thus, a mobile phone search incident arrest could give police officers intimate knowledge of an arrestee's home – without a warrant. A mobile phone's ability to give police officers access to individuals' homes is why the Florida Supreme Court equated allowing a warrantless search of an arrestee's mobile phone to handing police officers "a key to access the [arrestee's] home . . . ." *Smallwood v. State*, 113 So. 3d at 738.

For instance, a police officer could hold a sincere belief that an individual's home contains evidence of a crime. But, the officer might not have probable cause to obtain a search warrant to search that individual's home. Under a rule that allowed a

warrantless search of a mobile phone incident to arrest, the officer could follow and arrest that individual for jaywalking. From a mobile phone search, the officer could view security footage of the individual's home. At that point, the officer could determine whether a warrant to search the arrestee's home would be needed. The officer will have gained probable cause to obtain a search warrant for the arrestee's home via searching the arrestee's mobile phone without a warrant.

If the federal Constitution does not protect individuals from the aforementioned search, then States may choose "to protect privacy beyond the level that the Fourth Amendment requires." *Virginia v. Moore*, 553 U.S. 164, 171 (2008). However, if the States adopted differing rules, individuals would be subject to a warrantless home search via a search of a mobile phone incident to arrest based upon what state they live in or travel to.

Thus, allowing States to choose to protect mobile phones from warrantless searches incident to arrest could interfere with the Fourth Amendment's bright line at the home's threshold. An individual could live in a state with a more protective rule, but then travel into a state that follows the federal rule. A police officer from the state that the individual travelled into could arrest the individual for jaywalking, search the individual's mobile phone, view the individual's home via a security camera, and transmit the information to a police officer in the individual's home state.

In this way, a permissive federal rule that allows searches of mobile phones incident to arrest could result in unequal application of the Fourth Amendment's protection of the home. *See Payton v. New York*, 445 U.S. 573, 586 (1980) ("[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"). The Fourth Amendment's protections should not be variable, nor turn upon which State an individual lives in or travels to. *See Whren v. United States*, 517 U.S. 806, 815 (1996).

II. Pursuant To A Search Incident To Arrest, A Police Officer Should Be Able To Seize An Arrestee's Electronic Devices, But Should Then Obtain A Search Warrant To Search The Electronic Devices

In this case, the Court could hold that a police officer may seize an arrestee's electronic device pursuant to a search incident to arrest, but must then obtain a search warrant to search the seized electronic device. This suggested rule achieves several Fourth Amendment goals: the rule (1) governs various technological devices; (2) guides police officers, magistrate judges, and trial courts; (3) protects individuals' reasonable expectations of privacy; and (4) fulfills the search incident to arrest exception's dual rationale. Furthermore, the suggested rule "'provide[s] a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment . . . .'" *Kyllo v. United States*, 533 U.S. at 39 (quoting *Oliver* v. *United States*, 466 U.S. 170, 181 (1984)).

By contrast, a narrower protective rule could cause confusion, and a broader permissive rule could harm individuals' reasonable expectations of privacy. On the one hand, a narrow protective rule could require a police officer to obtain a warrant to search a specific type of mobile phone, like an Android or an iPhone. On the opposite extreme, a broader permissive rule would allow all warrantless searches of mobile phones incident to arrest. Neither of these rules is a "workable accommodation" between law enforcements' needs and individual's reasonable expectation of privacy. *Kyllo v. United States*, 533 U.S. at 39.

A. The Suggested Rule Governs Various Technological Devices

Modern technology permits individuals to carry a vast amount of private information on their person in one device. *See Smallwood v. State*, 113 So. 3d at 731-32. In this case, that device is a mobile phone. In future cases, and in routine cases across the United States, the device could be a digital camera, a laptop, a pager, a tablet, a pair of Google glasses, or an mp3 player. Any one of those devices could contain a large quantity of private, personal information. A holding that applied to all of those devices would help police officers, magistrate judges, and trial courts determine whether a warrantless search would be proper.

B. The Suggested Rule Guides Police Officers, Magistrate Judges, And Trial Courts

Each time modern technology changes, the Court could tailor a narrow rule to the particular technological device at issue. But, such an approach could cause police and magisterial confusion.

Fourth Amendment jurisprudence favors clear rules for police officers to follow. *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *Schlossberg v. Solesbee*, 844 F. Supp. 2d at 1170; *New York v. Belton*, 453 U.S. at 459-60, *abrogation recognized by Davis v. United States*, 131 S. Ct. 2419 (2011) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."). Whether or not an officer could conduct a warrantless search would depend upon the precise technological device. In turn, a police officer in the field may not have time to determine whether a warrant is required for a search. *See Schlossberg*, 844 F. Supp. 2d at 1170. Then, if the arrest resulted in criminal charges, magistrate and trial judges would need to second-guess police officers' snap judgments.

If the Court's rule distinguished electronic devices based on their capabilities, allowing warrantless searches for less advanced mobile phones, but requiring a warrant for smartphones, "officers [would be forced] to learn and memorize the capabilities of constantly changing electronic

devices." *Schlossberg v. Solesbee*, 844 F. Supp. 2d at 1170 ("A primary goal in search and seizure law has been to provide law enforcement with clear standards to follow"); *State v. Smith*, 920 N.E.2d at 954 ("[I]t would not be helpful to create a rule that requires officers to discern the capabilities of a [mobile] phone before acting accordingly."); *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009) ("[T]o require police officers to ascertain the storage capacity of a cell phone before conducting a search would simply be an unworkable and unreasonable rule.").

C. The Suggested Rule Protects Individuals' Reasonable Expectation Of Privacy

A warrantless search of a mobile phone can be invasive and intrude upon individuals' reasonable expectation of privacy. *Smallwood v. State*, 113 So. 3d at 732 (quoting *United States v. Lucas*, 640 F.3d at 178). Especially "[w]hen history has not provided a conclusive answer, [the Court has] analyzed a search or seizure in light of traditional standards of reasonableness . . . ." *Virginia v. Moore*, 553 U.S. at 171.

While it is difficult to quantify individuals' reasonable expectation of privacy, there are some ways to demonstrate that many individuals who own mobile phones do have a subjective expectation of privacy in their mobile phones and their mobile phones' contents. For instance, half of Americans with smartphones "have cleared their phone's [Internet] search or browsing history," Jan Lauren Boyles, Aaron Smith & Mary Madden, *Privacy and*

Data Management on Mobile Devices 3 (2013), *available at* http://tinyurl.com/n6yfuls, and about one-third "have turned off their phone's location tracking feature." *Id.* Smartphone owners are more likely than other mobile phone owners to feel that "someone has accessed [their] phone in a way that felt like a privacy intrusion." *Id.* at 4 (explaining that 15% of smartphone owners have felt that their privacy was invaded, versus 8% of other mobile phone owners).

Also, mobile phones have features that increase their users' privacy expectations. Mobile phones can be locked with a password or have an application that remotely wipes the mobile phones' contents in case the mobile phone is lost or stolen. *Find My iPhone, iPad, and Mac*, Apple.com, http://tinyurl.com/mut5obb (last visited April 3, 2014). Interestingly, only about 8% of smartphone users use, or perhaps are aware of, the application that can remotely wipe their phone's contents, and 64% of smartphone users do not have a "lock" that requires some form of passcode to use their phone. *Keep Your Phone Safe: How to Protect Yourself From Wireless Threats*, ConsumerReports.org, http://tinyurl.com/o28upnc (last visited April 3, 2014). It is possible that smartphone users do not utilize these security features because they do not expect that other individuals will have physical access to their phones without their permission.

A broad, permissive rule does not allow individuals to realize their expectation of privacy in their mobile phones and the private data their mobile phones contain. Mobile phones have become an integral and

necessary part of individuals' modern lives. *In re United States for an Order Authorizing the Release of Historical Cell-Cite Info.*, 809 F. Supp. 2d at 115. Many individuals are never "more than a few feet away from their cell phones." *Id.* The same holds true for many other technological devices, such as laptops or iPads. *Schlossberg v. Solesbee*, 844 F. Supp. 2d at 1170.

If a police officer has probable cause that an individual has violated the law, a search and seizure are justified regardless of the individual officer's motivations. *Whren v. United States*, 517 U.S. at 818-19. At the same time, the Fourth Amendment's warrant requirement acts to ensure that individuals' reasonable expectation of privacy is not subject "to the whim of an individual police officer in the field." *United States v. Villamonte-Marquez*, 462 U.S. 579, 600-01 (1983) (Brennan, J. dissenting). As the *Whren* Court stated, the Fourth Amendment's protections should not be variable, nor should they "turn upon . . . trivialities." *Whren*, 517 U.S. at 815.

Once a police officer in the field has seized a mobile phone, a snap judgment, the police officer can then seek independent judicial review of his or her need to search the mobile phone's contents. This allows the police officer to simultaneously secure evidence and protect the individual's privacy rights. A police officer can act in good faith but be motivated by implicit bias against an individual. Cheryl Staats & Charles Patton, *State of the Science: Implicit Bias Review* 36-39 (2013), *available at* http://tinyurl.com/kntjae9. Because implicit bias is unconscious by nature, a police officer acting under

an implicit bias does not intentionally seek to harm an arrestee or impinge upon an arrestee's reasonable expectation of privacy. *Id.* at 6-7.

Requiring judicial scrutiny for mobile phone searches helps prevent implicit bias because the warrant application process ensures that once a mobile phone is secured, police officers can make a planned out decision to search a mobile phone rather than a snap judgment. Given the magnitude of the personal information that mobile phones can contain, the Fourth Amendment should require police officers to routinely get a warrant to search mobile phones. This, in turn, ensures that a judicial officer independently reviews the exercise of discretion by officers in the field.

Moreover, sometimes police officers do not act in good faith. For instance, in *Newhard*, the plaintiff alleged that a police officer arrested him and searched his mobile phone without a warrant. *Newhard v. Borders*, 649 F.Supp.2d 440, 444 (W.D. Va. 2009). The mobile phone contained nude pictures of the plaintiff and his girlfriend "in 'sexually compromising positions.'" *Id.* The officer shared the intimate pictures with other officers and members of the general public. *Id.* The district court referred to the police officer's conduct as "irresponsible, unprofessional, and reprehensible." *Id.* Even so, the district court held that the plaintiff was not entitled to relief under 42 U.S.C. § 1983 because the officer "who allegedly searched through the cell phone did not violate any 'clearly established' constitutional right of [the plaintiff's] under the Fourth Amendment and is thus entitled to qualified

immunity." *Id.* at 450. Thus, the suggested rule protects individuals from "unprofessional" officers as well as officers who act in good faith, but through implicit bias.

At the same time, the suggested rule allows for police officers to search a mobile phone if exigent circumstances exist. Two of the exigencies that apply to warrantless searches of homes readily apply to mobile phones.

First, the "emergency aid exception" would apply to a warrantless mobile phone search. *See Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). For instance, if officers had reason to believe that searching a suspect's mobile phone could prevent injury to a kidnapping victim, they could search the mobile phone.

Second, the "need to prevent imminent destruction of evidence" is also applicable. *Ibid.* The potential for destruction of evidence could be a reason for allowing a search incident to arrest. But if an officer has actual knowledge that an associate of the arrestee is poised to destroy evidence on a mobile phone in police custody, then an officer's warrantless search of a mobile phone would be permissible under this exigent circumstance exception to the warrant requirement. Destruction of evidence is a recognized exigency that would apply to mobile phones even if warrantless searches were not allowed under the incident to arrest exception.

D. The Suggested Rule Fulfills *Chimel*'s Dual Rationale For The Search Incident To Arrest Exception

Gant illustrates that the dual rationales for searches incident to arrest do not apply to mobile phones once they are seized from an arrestee's person. *Smallwood v. State*, 113 So. 3d at 735. Once an arrestee is separated from the mobile phone, the arrestee cannot use the mobile phone as a weapon nor destroy evidence contained within the phone. *Id.* At the time when the arrestee's mobile phone is in police custody, the arrestee's high expectation of privacy in the mobile phone's contents should require police officers to "'then obtain a warrant before intruding into the phone's contents.'" *Id.* at 736 (quoting *State v. Smith*, 920 N.E.2d 949 (Ohio 2009)).

A basic tenet of Fourth Amendment jurisprudence is that a warrantless search is per se unreasonable. *Hawkins v. State*, 307 Ga. App. 253, 263-64 (Ga. Ct. App. 2010) (Phipps, J. concurring & dissenting) (quoting *Arizona v. Gant*, 129 S.Ct. 1710 (2009)). This tenet is "'subject only to a few specifically established and well-delineated exceptions.'" *Id.* The Fourth Amendment's warrant requirement tempers police officer discretion with judicial scrutiny. *See Gant*, 556 U.S. at 345. When the justifications for a warrantless search are no longer present, a police officer's search "may be made only under the authority of a search warrant." *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *see United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, C.J. concurring).

CONCLUSION

The Court should affirm the First Circuit's ruling and require that police officers obtain a warrant to search a mobile phone after it is seized pursuant to a search incident to arrest. A consistent rule in this case will help police officers in the field and will protect individuals' reasonable expectation of privacy as their home lives become more dependent on mobile technology.

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AMICUS CURIAE BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

BRIMA WURIE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police, without obtaining a warrant, to review the call log of a cell phone found on a person who has been lawfully arrested.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case centrally concerns Cato because it represents an opportunity to improve Fourth Amendment doctrine and maintain that provision's protections in the modern era.

SUMMARY OF THE ARGUMENT

The challenge of applying the Fourth Amendment to modern circumstances, such as when government agents search the cell phone of an arrestee, is best met by applying the terms of the amendment with specificity and care. This Court can provide a sensible rule for cell phone searches and model how to apply the Fourth Amendment for lower courts, by eschewing sweeping pronouncements or guesses about Americans' expectations of privacy. Rather, the Court should apply the terms of the Fourth Amendment to the facts of the case.

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored any part of this brief and that only *amicus* made a monetary contribution to its preparation or submission.

The Court should analyze distinctly each seizure and search that occurred, closely examining the legal basis for those that are contested. There are ways that law enforcement can access information without search or seizure, of course, and plain-view observation of an item properly seized is not an additional seizure or search.

Searching a phone makes use of it for the government's purposes, a seizure that is distinct from taking physical possession and which requires independent legal justification. Use and enjoyment are property rights distinct from possession, and they can be seized separately from a seizure of possession.

As in *Riley*, the Court should recognize and explicitly state that cell phones are constitutional effects. In addition, it should find that the content stored on cell phones includes constitutional papers and effects distinct from the phones themselves. Digital files stored on cell phones serve the same human ends that papers, postal mail, books, drawings, and portraits did in the founding era.

The search of respondent Wurie's cell phone did not meet the standards set by *Chimel v. California*, 395 U.S. 752 (1969), which allows warrantless searches only to the extent necessary to protect officers and prevent escape or to prevent destruction of evidence.

This case is not a candidate for a *Terry*-like exception to the warrant requirement. Allowing searches of a cell phone's digital content in an uncertain, narrow band of factual circumstances would produce difficulties in judicial and police administration and risks to the public's Fourth Amendment interests too great in relation to the law

enforcement benefit. The simpler rule requiring a warrant in the absence of exigency is the appropriate way to administer Fourth Amendment rights. The methodical application of Fourth Amendment and these considerations require that the judgment of the lower court be affirmed.

ARGUMENT

I. THE COURT SHOULD ANALYZE EACH SEIZURE AND SEARCH IN THIS CASE DISTINCTLY, AS WELL AS PLAIN-VIEW INFORMATION GATHERING

As in many Fourth Amendment cases that this and lower courts consider, the arrest and investigation of respondent Wurie was a series of seizures and searches, some of which are contested. Articulating and distinctly examining each seizure and search can improve this Court's consideration of the issues, while modeling for lower courts how to apply the Fourth Amendment in difficult cases. The court below articulated well the plain-view observation of information the seized phone displayed and the subsequent search of the cell phone, rightly treating it as distinct from its earlier seizure.

Amicus finds an additional seizure and search concerning the use of respondent Wurie's keys to access the threshold of two private homes and unlock the front door of one of them while a woman and baby were inside. The use of keys in this way was not justified by search-incident-to-arrest doctrine, which justified only taking possession of them. Using Wurie's keys at the doors of private homes was a seizure distinct from the taking of his possessory interest in them at arrest. Searching at the outer and

inner doors of two private homes for evidence of Wurie's residency should have required a warrant.

A. "Seizure" and "Search" Are Distinct Activities, Even if They Are Often Used Together to Investigate Suspects.

As your *amicus* also noted in *Riley v. California*, (13-132), this Court's cases have rarely defined "seizure" distinctly from "search." *United States v. Jacobsen*, 466 U.S. 109, 114 n.5 (1984) ("[T]he concept of a 'seizure' of property is not much discussed in our cases"). This is in part because incursions on property rights—seizures—are often the means government agents use to discover information: Seizure is the way they search.

Often, seizures and the searches they facilitate have the same legal justification—or they both lack one. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 949 (2012) ("The Government physically occupied private property for the purpose of obtaining information."). It is convenient to refer to small seizures and the searches they facilitate collectively as though they are a unitary "search." *See, e.g.*, *Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (moving of stereo equipment to gather serial numbers "constitute[d] a 'search'"). Unfortunately, the convenience of lumping together seizures and searches has occasionally permitted this Court to treat small seizures as though they did not occur. *See, e.g.*, *New York v. Class*, 475 U.S. 106, 114 (1986) (police officer lifting papers not considered a seizure).

Seizures and searches are not the same, and they do not always occur together. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 32 (2001) ("a 'search' despite the absence of trespass"); *Soldal v. Cook*

County, 506 U.S. 56 (1992) (seizure of mobile home, not part of search). Collapsing important distinctions between seizure and search can obscure the legal import of government agents' actions—particularly with respect to information technologies, whose Fourth Amendment consequences spring not so much from their possession as from their *use*.

A government agent who only takes possession of a digital device does little to undermine the security of the papers and digital effects its owner has stored on it. A government agent *using* the device to bring stored information out of its natural concealment does a great deal to threaten the interests that the Fourth Amendment was meant to protect.

Similarly, a government agent taking possession of house keys does not undermine the security of the home very much. Using those keys to unlock the front door does a great deal to threaten Fourth Amendment interests.

Casual use of language in Fourth Amendment decisions from the 1980s may suggest that only the "possessory" interest in property can be seized by government agents. *See United States v. Place*, 462 U.S. 696, 705 (1983) (discussing "possessory" interest in luggage); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (seizure found because destruction of powder infringed "possessory interests"); *United States v. Karo*, 468 U.S. 705, 712 (1984) (installation of beeper does not interfere with "possessory" interest); *cf. Karo* 468 U.S. at 729 (Stevens, J., dissenting) ("Surely such an invasion is an 'interference' with possessory rights; the right to exclude . . . had been infringed."). In the past, it may have been sound to treat deprivation of "possessory

interests" and constitutional "seizures" as one and the same. Nearly always, possession of an item was the aspect of ownership material to Fourth Amendment cases. This approach does not translate to the information technology context if the interests secured by the Fourth Amendment are to survive.

The right to possess property is one of several aspects of ownership identified in legal philosophy. *See*, TONY HONORÉ, *Ownership, in* OXFORD ESSAYS ON JURISPRUDENCE 104-147 (A.G. Guest ed., 1961). The right to use property is another distinct aspect of ownership. The right to the income of property—the enjoyment of its benefits—is yet another in what law students are taught to be the "bundle of sticks" that comprise property rights.

This Court should recognize all the dimensions of seizure, including taking the use and enjoyment of digital devices and physical items for the government's benefit. This Court should recognize that use and enjoyment are property rights that can be seized distinctly from possession. Doing so will allow this Court to apply long-standing principles, even in a "high-tech" case, to "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34; *Jones*, 565 U.S. at 950 (majority opinion); *Id.* at 958 (Alito, J., concurring in the judgment).

B. The investigation and arrest of Wurie was a series of seizures and searches, as well as gathering of information in plain view.

When Boston police stopped and arrested respondent Wurie, they had observed him apparently

committing an illegal drug sale in plain view. *See Horton v. California*, 496 U.S. 128, 136-37 (1990). Their suspicions confirmed by the other party to the transaction, the seizure of Wurie and his car, *Brendlin v. California*, 551 U.S. 249, 254-263 (2007), was based on probable cause.

Consistent with standard practice for a booking search, a separate legal basis for searching suspects and seizing property, *see, e.g., Illinois v. Lafayette*, 462 U.S. 640 (1983), Wurie was dispossessed of two cell phones and $1,275.

Shortly thereafter, one of the phones began to indicate that it was receiving calls, displaying the identifier "my house" on its external caller ID screen. (Joint App. 44) The cell phone being properly seized and in the possession of the Boston police, they were entitled to observe and take cognizance of its external features and displays, including the "my house" display, which was in plain view. *Horton*, 496 U.S. at 136-37.

Officers Robert England and Kevin Jones drew sensible inferences from the information that was now available to them. The "my house" alias given to a number stored in a cell phone is likely to be the number of a landline phone in the domicile of the phone's owner. They could learn Wurie's probable landline number and thus his street address by accessing the telephone number stored inside the phone. And this they did. They "opened the phone to look at the phone call's log." (Joint App. 44)

Opening the flip-phone and pressing two buttons was not observation of information in plain view. It was an additional seizure of the phone, a use and manipulation of it for the government's purposes.

The manipulation of the phone did not affect possession, as the phone was already under the complete physical control of the government. Instead, the government made *use* of the phone and the data in it for its purposes, gathering the information stored in it and effectuating a search. This seizure-based search, in addition to discovering the phone number associated with the "my house" identifier, also revealed a photo of a woman and baby, presumed loved ones of respondent Wurie's, which was displayed as the phone's wallpaper.

As noted above, *use* is an aspect of ownership distinct from possession. HONORÉ, *supra*, at 162, 165. Looking through a phone makes use of the electronics, the battery, the display technology, and the data, none of which are ordinarily the property of the government agent to use. Government agents are allowed to exercise this aspect of ownership—to use the phone as if it were their property—with sufficient legal justification. The power of Officers England and Jones to do this is what respondent Wurie contests.

Having gathered the telephone number associated with the "my house" identifier and the photograph of the woman and baby, Officer Jones typed that number into a reverse lookup service, discovering an address in Boston where they believed respondent Wurie lived.

Armed with this information, Sergeant Detective Murphy and "several members of the Drug Control Unit" went to investigate that address. (Joint App. 22) Looking into the house from the sidewalk, a plain view observation, they saw a woman resembling the one whose image was stored by the cell phone and displayed as its wallpaper.

Sergeant Detective Murphy then took respondent Wurie's keys and used them to unlock the door and enter the vestibule of the residence. (Joint App. 22) He was apparently not certain of the identity between the woman pictured in the cell phone and the woman in the first-floor apartment because he first tried to use the keys to unlock the door of the home on the second floor. Returning to the first floor, he found that "one key unlocked the door." (Joint App. 23) Sergeant Detective Murphy's affidavit does not say whether he restored the door to its prior locked position before knocking and engaging the occupant of the residence in continuation of his investigation.

Like manipulating a cell phone to access the information it stores, manipulating keys to test and unlock the outer and inner doors of private residences is a use of property distinct from the seizure that occurred when government agents took respondent Wurie's keys upon his arrest. Sergeant Detective Murphy *used* the keys and the lock mechanism at the vestibule for two homes to infer that Wurie lived within one of them. He used the keys and the lock mechanism at the home of unknown people on the second floor, inferring from their non-operation that Wurie did not live there. He then used the keys and the lock mechanism on the first floor—unlocking the front door of a home with a woman and baby inside—to infer that the first floor residence was respondent Wurie's.

"Houses" are specifically named in the Fourth Amendment because they have traditionally been the locus of activity and communications the Framers meant to protect from government access and scrutiny. *See Boyd v. United States*, 116 U.S. 616,

624-627 (1886) (recounting history related to Fourth Amendment and "unreasonable searches and seizures"). This Court has been particularly solicitous of the home, of course. *See, e.g.*, *Gouled v. United States*, 255 U.S. 298, 305-06 (1921), *Agnello v. United States*, 269 U.S. 20, 32 (1925) (calling the search of a private dwelling without a warrant . . . "unreasonable and abhorrent to our laws."). Sergeant Detective Murphy's further seizure of the keys and the lock mechanisms on two private homes—making use of others' property for the government's investigatory purposes—must meet the standards of the Fourth Amendment just like the use of the cell phone to discover otherwise unavailable information. Like all others, he enjoyed an implicit license to approach the home and knock or ring the bell at the outer door, *see Florida v. Jardines*, 133 S.Ct. 1409, 1415-16 (2013), but using the outer- and inner-door lock mechanisms of private homes in hopes of discovering incriminating evidence is something else. Sergeant Detective Murphy should have sought a warrant for this search.

The question whether the cell phone seizure and search that Officers England and Jones conducted satisfies the Fourth Amendment relies on a premise agreed upon by both parties, and which this Court should explicitly affirm: Cell phones and their contents are "papers and effects" protected by the Fourth Amendment.

II. THIS COURT SHOULD RECOGNIZE THAT PHONES ARE THEMSELVES FOURTH AMENDMENT "EFFECTS," AND THAT PHONES CONTAIN FOURTH AMENDMENT PAPERS AND EFFECTS

This Court should explicitly endorse the premise adopted by all parties in this case and in *Riley v. California*, that a cell phone is an "effect" under the Fourth Amendment. It should also explicitly acknowledge that among other content stored by the cell phone in this case were constitutional "papers and effects" in their own right, distinct from the physical phone.

A. A Cell Phone Is an "Effect" Under the Fourth Amendment.

If a car is an effect for purposes of the Fourth Amendment, *Jones*, 132 S. Ct. at 949, and a footlocker is an effect, *United States v. Chadwick*, 433 U.S. 1, 12 (1977), then a phone must also be an effect. Cell phones are typically carried on one's person. They can contain copious amounts of personal information. They have that "intimate relation" to the person that characterizes personal effects. BLACK'S LAW DICTIONARY 1143 (6th ed. 1990) (defining "personal effects").

Yet *amicus* knows of no case holding that a cell phone is an "effect" for purposes of the Fourth Amendment. Perhaps this is because lower courts treat the matter as too obvious to state, or because Fourth Amendment doctrine leads courts so far from the text of the law, or even because *amicus*'s research skills are inadequate. An explicit holding that a cell phone is an effect would aid the work of courts below—as well as advocates before them—all of whom might be reminded to think methodically about applying the terms of the Fourth Amendment to the cases they consider.

B. Wurie's Cell Phone Held Constitutional "Papers and Effects."

Cell phones themselves are fairly obviously effects. Some of the contents stored by cell phones are also rightly treated as papers and effects distinct from the material phone. The cell phone government agents seized from Wurie contained stored papers and effects, including a photograph and a contact list. This Court should hold explicitly that the photograph and contact-list information on Wurie's cell phone were, for constitutional purposes, papers and effects protected by the Fourth Amendment.

As your *amicus* detailed in our *Riley* brief, the communications and storage functions of cell phones serve the same human ends today that papers, postal mail, books, drawings, and portraits did in the founding era. This Court should clearly acknowledge that the Fourth Amendment protects digital equivalents of the same types of documents that it protects in analog form. In this case, the Court should find that at the very least the photo discovered by Officers England and Jones and the contact entry they accessed were papers, effects, or both.

Finding that a photo in a cell phone or a contact entry is a constitutional paper or effect does not establish whether its seizure or search is reasonable or unreasonable, constitutional or unconstitutional. These subjects we turn to next.

III. THE SECONDARY SEIZURE AND SEARCH OF WURIE'S CELL PHONE WERE NOT JUSTIFIED BY THE *CHIMEL* FACTORS, AND NEITHER WERE THE FURTHER SEIZURE OF HIS KEYS FOR USE IN A SEARCH OF THE VESTIBULE AND FRONT DOORS OF TWO HOMES

Absent a warrant, the search and seizure of a suspect's property is *"per se* unreasonable" unless justified by one of "a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). The First Circuit Court of Appeals was correct to hold "that the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person." *United States v. Wurie*, 728 F.3d 1, 13 (2013). Though properly taken from respondent Wurie in the course of his arrest, the further seizure of the phone in using it to reveal personal information should have awaited a warrant.

A warrant should also have been required for the search of two homes using his keys. The *Chimel* factors in no way permit keys seized from an arrestee to be used as investigatory tools at the entry to the vestibule and at the front doors of two homes, or to unlock the door of a home occupied by a woman and her baby.

A. The Exceptions to the Warrant Requirement for Searches Incident to Arrest Do Not Apply to Digital Searches.

This Court did not create a broad new authority for officers to search suspects and seize their property in *Chimel* and *Robinson*. Rather, the Court recognized the continuing validity of two long-

standing but separate exceptions to the general rule against warrantless seizures and searches.

In *Chimel*, this Court reiterated the importance of the Fourth Amendment's warrant requirement: "It is a cardinal rule that . . . law enforcement . . . use search warrants wherever reasonably practicable." *Chimel* 395 U.S. at 758 (quoting *Trupiano v. United States*, 334 U.S. 699, 705 (1948)). This Court articulated clearly and sensibly the extent of the "search incident to arrest" principle:

> [I]t is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

Chimel, 395 U.S. at 763 (1969)

In *United States v. Robinson*, 414 U.S. 218 (1973), this Court further reiterated the two prongs of the "search incident to arrest" exception to the warrant requirement. *Robinson* overturned a ruling suggesting that the only reason for a full search was discovery of evidence or the fruits of a crime. "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." *Id.* at 234.

The *Robinson* Court pragmatically approved the examination of a crumpled cigarette package on the

person of an arrestee, giving rise to a "container" doctrine that this Court has since had to curtail. *See, e.g., Chadwick*, 433 U.S. at 1 (1977); *Arizona v. Gant*, 566 U.S. 332 (2009). Courts have applied this doctrine to cell phones, too—not chastened, apparently, by container-doctrine trends. *See, e.g., People v. Diaz*, 244 P.3d 501 (Cal. 2011); *Hawkins v. Georgia*, 290 Ga. 785, 787 (Ga. 2012); *Massachusetts v. Phifer*, 463 Mass. 790, 795-96 (Mass. 2012).

In retrospect, Justice Marshall's dissent in *Robinson* is prescient. He called for a more granular assessment of the search, saying: "the search in this case divides into three distinct phases: the patdown of respondent's coat pocket; the removal of the unknown object from the pocket; and the opening of the crumpled-up cigarette package." *Robinson*, 414 U.S. at 249-250 (Marshall J., dissenting). He believed that the removal of the cigarette package was unwarranted because the danger was not great and because no evidence of a driving infraction would be found, much less would such evidence be at risk of destruction. *Id.* at 250-255.

That granularity of analysis in Fourth Amendment methodology commends itself in this case, as it did in *Riley*, regardless whether one agrees or disagrees with Justice Marshall's conclusion in *Robinson*. A carefully analytical *Robinson* majority could have found, for example, that the officer developed reasonable suspicion about the crumpled cigarette pack because there is no good reason to keep one on hand after one's cigarettes are gone.

The "search incident to arrest" doctrine is two separate exceptions to the warrant requirement that enjoy independent pedigrees and rationales. An

arresting officer's search for weapons and other dangerous articles has a twofold justification: "[a] due regard for his own safety," *Closson v. Morrison*, 47 N.H. 482, 484 (NH 1867), and the need to prevent the prisoner from escaping custody, which would see "the arrest itself frustrated." *Chimel*, 395 U.S. at 763. Because Wurie could not use the digital contents of his phone to attack Officers England or Jones or to effect his escape, their search of it was not grounded in "search incident to arrest" principles.

1. Digital Data Is No Threat to Officers.

The average cell phone is fragile, inefficient, and expensive as a bludgeoning tool. But because it could conceivably be used in an attack, its seizure at the time of an arrest is a wise precaution, justified under *Chimel*. Leaving a modern smartphone in an arrestee's possession could aid in his escape—most dramatically by his calling in heavily armed confederates. An arrestee's ability to communicate from detention can also help protect his or her rights, *see, e.g.*, Mallory Simon, *Student 'Twitters' his way out of Egyptian Jail*, CNN.com (2008),[2] but, on balance, in situations with a prospect for violence, taking the phone out of the prisoner's physical reach eliminates potential uses in escape and assures officer safety.

But Officers England and Jones went beyond securing Wurie's phone against use in an attack. They used it themselves to reveal digitally stored information—a distinct form of seizure/search that

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[2] Available at http://www.cnn.com/2008/TECH/04/25/twitter.buck/index.html.

lacked the legal justification of the initial arrest or seizure of the phone itself. Looking at the contact entry in Wurie's phone in no way increased their safety or reduced the likelihood of Wurie's escape.

In *Chimel*, this Court permitted the search of areas and objects near a suspect at the time of arrest to ensure officer safety, but limited those searches to areas immediately physically accessible by the suspect, noting that there was no safety justification "for routinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." 395 U.S. at 763. The Court's logic was clear: Even very dangerous weapons like guns and knives pose no risk if the suspect is physically incapable of using them. The necessity of protecting officers during the arrest and transport of prisoners does not justify searching for or seizing weapons that are beyond a prisoner's reach. *See also*, *Arizona v. Gant*, 556 U.S. 332 (2009) (police may not search a vehicle as a consequence of arresting its driver or owner unless the suspect had physical access to the vehicle at the time of the arrest). Property that cannot be used to cause anyone harm cannot be seized or searched in the name of officer safety.

Officers England and Jones had no safety-based reason for searching the contents of Wurie's phone.

2. There was No Threat of Evidence-Destruction.

The other exception to the warrant requirement afforded by *Chimel* and *Robinson* does not permit open-ended searches for any and all incriminating evidence or contraband. Rather, the exception

permits search of an arrestee based "on the need to preserve evidence on his person for later use at trial." *Robinson*, 414 U.S. at 234. *See also*, *Weeks v. United States*, 232 U.S. 383, 392 (1914). When evidence is no longer on an arrestee's person, this branch of "search incident to arrest" doctrine does not apply.

This Court has held that the *Chimel* exception only extends to cases in which seizure alone would be "insufficient" to prevent the evidence's loss or destruction before police could obtain a warrant authorizing a search. *Chadwick*, 433 U.S. at 13. As a general rule, this Court has held that once a physical container, item, or location, is under the exclusive control of law enforcement, the evidence there is "safe" and the police are required to apply for a warrant before conducting a search. *Illinois v. McArthur*, 531 U.S. 326 (2001).

It has been argued that cell phones and other digital devices ought to be treated differently from physical storage containers because of the risk that the suspect's friends, relatives, or co-conspirators would remotely delete the data on the phone. *See, e.g.*, *United States v. Flores-Lopez*, 670 F.3d 803, 807-09 (7th Cir. 2012) ("Other conspirators were involved . . . besides . . . the defendant, and conceivably could have learned of the arrests . . . and wiped the cell phones remotely before the government could obtain and execute a warrant and conduct a search.").

That could be a real prospect in the future, but it was not in this case. There is no evidence that Sergeant Detective Murphy raced to secure the cell phone because it contained potential evidence. The phone's call signaling attracted the attention of Officers England and Jones, who were not

apparently interested otherwise in securing what evidence it might reveal.

Phone-wiping is fairly exotic, and in the most common case—a remote signal initiated by the owner—the threat is fairly easily and cheaply defeated either by turning the phone off, removing the battery, or placing the device in a container (commonly known as a "Faraday bag") that shields radio waves. Faraday bags are available for about the same price as a set of handcuffs.

The same threat of evidence destruction can exist in physical environments, but that does not justify warrantless searches of physical property under *Chimel*. Sergeant Detective Murphy acted consistently with this rule at the door of the Silver Street home. Though he knew that a confidante and likely confederate of Wurie's was inside, that this risked destruction of evidence at any time, and that he could enter at will, having unlocked the door, he knocked on the door and waited for Wurie's companion to answer. He did not enter with the many other officers in attendance to immediately secure evidence against destruction.

Warrantless searching of physical property spurred by fear that evidence may be destroyed is governed by this Court's more general exigent circumstances precedents. *Kentucky v. King*, 131 S.Ct. 1849, 1854 (2011). *See also, Wong Sun v. United States*, 371 U.S. 471 (1963); *Ker v. California*, 374 U.S. 23 (1963); *Welsh v. Wisconsin*, 466 U.S. 740 (1984). *Chimel* does not permit exigent-like searching of a phone when it can be secured during the time application for a warrant is made.

There is no relevant distinction between the risk of hypothetical confederates deleting evidence stored on a phone or in remote storage and their destroying physical evidence when they learn of a co-conspirators arrest. To allow wide-ranging searches on this "confederates" theory would be a sharp departure from the Court's existing view of what is reasonable. The preservation-of-evidence rationale from *Chimel* does not permit police to perform free-standing investigative searches of phones, laptops, and other digital devices.

IV. A *TERRY*-LIKE EXCEPTION TO THE WARRANT REQUIREMENT FOR SOME CELL PHONE SEARCHES WOULD BE TOO DIFFICULT TO ADMINISTER

This close case may seem like a candidate for some exception to the general rule that a warrant is required for searches of cell phones. Respondent Wurie's phone put in plain view information that suggested a way to discover his residence and possibly evidence related to his arrest. The steps Officers England and Jones took to access the information were relatively simple. And flip-phones in 2007 had relatively little data and interactive features, decreasing the risks of inordinate privacy invasion. It could be that an officer with "reasonable grounds" to believe that evidence is available, and who makes a "carefully restricted" search aimed at "particular items" may be relieved of the warrant requirement. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Such a rule would require lower courts to engage in extensive factual investigations and legal line-drawing, though, related to least the factors mentioned in the paragraph above. What

circumstances make it apparent enough to government agents that information relevant to an investigation is near enough at hand? How simple is the operation that would access the sought-after information? How much risk of accessing irrelevant private data relating to either suspects or non-suspects did a given search involve? How much personal and private data did the particular phone in a given case store or access? What apps or other features on the phone increased the risk of excess disclosure, even in a "carefully restricted" search?

These considerations cannot be avoided, of course. But if this Court affirms that a warrant is required to search the seized phone of an arrestee absent exigency, they will be addressed as part of the regular push-and-pull between law enforcement agents and the magistrates that regularly oversee them already. That venue is well-suited to developing a "common law" of cell phone searches.

The alternative is to let law enforcement set the terms of cell phone "*Terry* searches," bringing courts —including this Court—in only sporadically, to make rough judgments that direct and redirect what the law of warrantless cell phone searches should be. This Court could expect to return many times over years to disputes about what factual circumstances justify a "quick" warrantless search of a phone and what factual circumstances do not.

Consensus about the rule from *Terry v. Ohio* may be that it allows a brief stop-and-frisk based on reasonable suspicion about evidence of crime, but the case itself is much more limited. The *Terry* majority was quite focused on the use of stop-and-frisk to avert danger to law enforcement officers and others.

Terry, 392 U.S. at 30 ("At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized."). The rule in *Terry*, like the rule in *Chimel*, is more limited than most people remember. Warrantless searches are justified by the acute interest in officer safety, not by the desire to readily discover evidence.

This Court should not allow government agents to search through a cell phone without a warrant merely because it was properly seized. Doing so would throw open too-wide a door onto suspects' and others' personal and private information without judicial supervision. Cell phones are doorways into people's lives as broad as the front doors of their homes, and courts' efforts to administer a regime of warrantless cell phone searching would be too difficult.

The government's use of respondent Wurie's keys to unlock the door of a private home without a warrant is a parallel: It shows that a proper seizure of possession does not entitle the government to make any and all uses of the item seized. Distinct and additional uses of a seized item must pass Fourth Amendment muster independently.

CONCLUSION

As in our filing in *Riley, amicus*'s argument here follows the structure one would use to apply the Fourth Amendment as a law, rather than as a stack of doctrines. Courts should examine whether there was a seizure or search, and whether any such seizure or search was of persons, papers, houses or effects. If those conditions are met, courts should examine whether each seizure and search was reasonable without a warrant.

Here, well after it was seized, Officers England and Jones searched respondent Wurie's cell phone, making use of it—a seizure not warranted by search-incident-to-arrest doctrine—for their investigative purposes. Sergeant Detective Murphy made similar unwarranted use of Wurie's keys, which, though seized, were not Murphy's to use in testing the front doors of two private homes and unlocking one of them. Because the seizures and searches of the respondent's cell phone did not meet *Chimel*'s exceptions to the warrant requirement, they violated Wurie's Fourth Amendment rights. The judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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RECORD
AND
BRIEFS

Nos. 13-132 & 13-212

In the Supreme Court of the United States

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

BRIMA WURIE

Respondent.

On Writs of Certiorari to the California Court of Appeal, Fourth District and the United States Court of Appeals for the First Circuit

BRIEF OF CENTER FOR DEMOCRACY & TECHNOLOGY AND ELECTRONIC FRONTIER FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER IN NO. 13-132 AND RESPONDENT IN NO. 13-212

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QUESTION PRESENTED

Amici Curiae will address the following question:

Whether the search-incident-to-arrest doctrine authorizes the government to search—without a warrant and without probable cause—the digitally-stored information contained in a portable electronic device found on the person or within the control of an individual at the time of his or her arrest.

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INTEREST OF THE *AMICI CURIAE*

The Center for Democracy & Technology (CDT) is a non-profit, public interest organization focused on privacy and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. CDT represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The Electronic Frontier Foundation (EFF) is a non-profit, member-supported organization based in San Francisco, California, that works to protect free speech and privacy rights in an age of increasingly sophisticated technology. As part of that mission, EFF has served as counsel or *amicus curiae* in many cases addressing civil liberties issues raised by emerging technologies.

CDT and EFF have participated as *amici* in cases before this Court involving the application of the Fourth Amendment to new technologies, including *City of Ontario* v. *Quon*, 560 U.S. 746 (2010), and *United States* v. *Jones*, 132 S. Ct. 945 (2012).[1]

SUMMARY OF ARGUMENT

Modern cell phones and other portable electronic devices contain very large amounts of sensitive, personal information—including an archive of communications with family and close friends, the equiva-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

lent of bookshelves worth of photo albums, and substantial personal medical and financial information.

Prior to the advent of digital technology, this information would have been stored in the drawers and file cabinets of people's homes. Law enforcement officers would have been required to obtain a warrant in order to search such materials.

The question before the Court is how the Fourth Amendment applies in light of this significant advance in technology—in particular, whether the search-incident-to-arrest exception authorizes warrantless searches of all of the information stored digitally on a portable electronic device found on an arrested individual's person.

Permitting warrantless searches of this large amount of information is inconsistent with the Fourth Amendment for three reasons.

First, the search-incident-to-arrest exception was recognized in the earliest days of our Nation, when information could be transported only if it was written on paper. That reality imposed a significant inherent limitation on the scope of the exception: because the amount of information an individual could carry was restricted by the weight and bulk of paper, the exception's intrusion on sensitive personal information would be circumscribed.

Technology now makes it possible for individuals to carry huge quantities of information with them every day. Permitting warrantless searches of digitally-stored information will allow police to rummage through vast quantities of individuals' personal information—precisely what the Framers of the Fourth Amendment sought to prevent.

Second, neither of the justifications for the exception support a search of the data stored on an electronic device. An inspection of the device is sufficient to establish that it poses no threat to police officers. And once the police officer has seized the device there is no risk that the arrestee himself will be able to access the device and destroy evidence. If the risk of destruction of evidence is present in a particular case—because the officers reasonably believe that the particular device's digitally-stored information will be deleted by the actions of a third party or other means that they cannot prevent using reasonably-available countermeasures—the well-established exigent circumstances exception will allow officers to act to preserve the information (but not search it) without obtaining a warrant.

Third, a bright-line rule requiring police officers to obtain a warrant before searching digitally-stored information is clear and therefore easily administrable. Standards under which the need for a warrant would turn on the relative sophistication of the particular portable electronic device would be impossible for officers to apply—they could not possibly keep track of the various relative capabilities of the myriad different types and models of these devices. Similarly, a rule that allows officers to search some categories of information but not others makes no sense because these devices increasingly are designed to integrate the different categories of information stored on the device and to seamlessly access remotely-stored data in ways that make it indistinguishable form the data stored on the device.

Finally, the warrant requirement is not burdensome. Once police have seized the device, it will not be difficult to present the warrant request to a judi-

cial officer and, if probable cause is shown, obtain the authorization that the Fourth Amendment requires.

ARGUMENT

THE SEARCH INCIDENT TO ARREST DOCTRINE DOES NOT AUTHORIZE WARRANTLESS SEARCHES OF INFORMATION STORED ON AN ELECTRONIC DEVICE.

This Court has recognized repeatedly that the Fourth Amendment's protections against government intrusions must be construed in light of the nature and effects of advances in technology. *United States* v. *Jones*, 132 S. Ct. 945 (2012); *City of Ontario* v. *Quon*, 560 U.S. 746 (2010); *Kyllo* v. *United States*, 533 U.S. 27 (2001).

When new technologies would allow the government to access previously unavailable information, the Court has taken those developments into account in delineating the Fourth Amendment's protections. See, *e.g.*, *Jones*, *supra* (GPS tracking device); *Kyllo*, *supra* (thermal imaging device); *Katz* v. *United States*, 389 U.S. 347 (1967) (wiretap of payphone); cf. *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1562-1563 (2013) (acknowledging that "technological developments that enable police officers to secure warrants more quickly * * * are relevant to an assessment of exigency").

That same need to consider the impact of advances in technology is presented in these cases as a result of innovations permitting digital storage of large amounts of information on increasingly ubiquitous portable electronic devices. Although the searches here involved information stored on cell phones, the federal government recognized below that its legal theory is not limited to those particular

devices and would permit the search of all digitally-stored data on "any electronic device seized from a person during his lawful arrest, including a laptop computer or a tablet device such as an iPad." 13-212 Pet. App. 15a.

A. Modern Cell Phones And Other Portable Electronic Devices Contain Enormous Amounts Of Sensitive Personal Information That Individuals Formerly Kept In Their Homes.

Advances in digital technology permit the storage on portable electronic devices of huge amounts of personal information—including communications with family and friends, diaries, pictures, and financial and health records—that individuals typically kept in their homes before the digital era. This information is generated in substantial part as a result of innovations that permit the use of these portable devices to send and receive email and text messages, and to perform a myriad of other functions.

The two cases before the Court involve cell phones, but many different types of portable electronic devices have the information-storage and other characteristics of cell phones.[2] For example, tablet computers and laptop computers have extensive storage, computing, and communication features.[3]

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[2] All of these devices, like cell phones, store data electronically in a series of *1*'s and *0*s. Conner Technical Services, http://perma.cc/QN3L-XT8R) ("The only [numbering system] * * * that an electronic device uses is binary * * * .").

[3] Christopher Barnatt, *A Guide to Computing: Mobile Computing* (Nov. 2, 2013), http://perma.cc/TWU9-VVTZ (explaining that modern laptops have the same functionality as desktop computers). Modern tablets allow a user to "browse the inter-

Digital cameras have substantial storage capabilities—for both still pictures and video, including sound.[4] And "thumb drives," small devices no larger than a thumb, can also store huge quantities of data.[5]

Thus, although we focus below on the capabilities of modern cell phones, those capabilities are shared by a significant number of other portable electronic devices that individuals routinely carry on their persons. And the variety of such devices is growing significantly as innovators find new ways to use electronic communications, storage, and computing technologies.

Modern cell phones[6] are ubiquitous: 91% of American adults own one.[7] These devices have dra-

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net, create and share presentations, video[] conference with clients, stay connected with corporate email, download books, games and videos, watch movies, share photos and much more * * * ." *Tablet: What is it? Which Tablet is Right for Me?*, Staples Advantage, http://perma.cc/AAG7-H566.

[4] The basic storage medium for images and video on a digital camera—flash memory—sells for $12 at 16 GB, which can hold 8,000 images or one hour of high-resolution video with sound. See *SanDisk Ultra 16 GB*, Amazon.com, http://perma.cc/ALS6-SU9F. Recently released memory cards for cameras already store up to four times more data than today's cell phones. See Consumer Electronics, 2013 WLNR 27310700 (Oct. 28, 2013) (noting that SanDisk released a 256 gigabyte memory card to keep up with developments in photography and videography).

[5] Even a small and simple thumb drive, which holds 2 GB of data and sells for less than four dollars at Walmart, see http://perma.cc/YZD5-MCFX, can hold up to one thousand photographs, *USB Flash Drives: How Much Storage Space is Enough?*, eBay, http://perma.cc/D4MQ-HV8X.

[6] Modern cell phones are sometimes described using two general, and overlapping, terms—"feature phone" and "smartphone." A smartphone is "[a] cellular telephone with built-in

matically expanded the amount and types of information that Americans carry every day.

The amounts of information that these devices can contain are staggering. For example:

- The Apple iPhone 5 is the largest-selling smartphone;[8] the version with the smallest storage capability (16 gigabytes ("GB")) can store 800 million words of text[9]—well over a

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applications and Internet access. In addition to digital voice service, modern smartphones provide text messaging, e-mail, Web browsing, still and video cameras, MP3 player and video playback and calling." *Definition of: Smartphone*, PC Magazine Encyclopedia, http://perma.cc/647Z-MGRW. Feature phones usually contain "a fixed set of functions beyond voice calling and text messaging, but [are] not as extensive as a smartphone." *Definition of: feature phone*, PC Magazine Encyclopedia, http://perma.cc/6RHP-DKRG. Thus, both types of phones store data digitally, and both provide text messaging and some common additional features, with smartphones providing a wider array of such features. We use "modern cell phones" to refer to both categories, unless specifically noted otherwise.

[7] Pew Research Center, *Cell phone ownership hits 91% of adults* (June 6, 2013), http://perma.cc/ALM7-QZBJ ("[T]he cell phone is the most quickly adopted consumer technology in the history of the world.").

[8] See Shane Cole, *Apple's iPhone 5s remains 'by far the top selling smartphone,'* Apple Insider (Dec. 12, 2013, 8:06 AM), http://perma.cc/PP3W-XQZV.

[9] *The Amazing History of Information Storage: How Small Has Become Beautiful*, Statistical Trends & Numbers (Aug. 12, 2012), http://perma.cc/9PFX-DPEE (noting that the complete 2010 Encyclopedia Britannica, which contains 32 volumes, weighs 129 pounds in physical form, and contains 50 million words, could fit in a single gigabyte of data).

football field's length of books[10] or, to use another measure, sixteen flat-bed truckloads of paper.[11]

- The same phone can contain over 8,000 digital pictures,[12] over 260,000 private voicemails,[13] or hundreds of home videos.[14]
- Other versions of the iPhone, with 32 GB or 64 GB of storage capacity, would be able to store twice or four times those amounts. Some manufacturers have produced phones with 128 GB memory—and therefore the ability to store *eight times* the amount of information contained on a 16 GB phone.[15]

These examples describe the storage capacity of modern cell phones in terms of "books," "photo-

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[10] An American football field, including end zones, is 120 yards long. Since "1 Gigabyte could hold the contents of about 10 yards of books on a shelf," 16 GB would correspond to about 160 yards of books. *Megabytes, Gigabytes, Terabytes ... What Are They?*, What's a Byte, http://perma.cc/8AAW-MVZQ.

[11] *How much data is there on a hard drive?*, Ctr. for Computer Forensics, http://perma.cc/T6CL-JTHG.

[12] *Number of pictures that can be stored on a memory device*, SanDisk, http://perma.cc/J7JW-7AC7.

[13] Assuming each voicemail lasts thirty seconds and is recorded at a bitrate of 16 kbps, a 16 GB device could hold over 266,666 voicemails.

[14] Assuming each home video is thirty seconds long, recorded at standard definition, 16 GB could store 480 such videos. See Derek Fung, *What Storage Should I Get in My Camcorder?*, CNET Australia (Sept. 23, 2009), http://perma.cc/QHX9-KNQ6.

[15] See Richard Lai, *World's first 128GB phone now available from Meizu, but only works in China*, Engadget (Nov. 18, 2013), http://perma.cc/SN77-V24S.

graphs," "videos," and "voicemails" for ease of explanation, but the information is stored on these devices in many different forms—including text messages, e-mails, Internet browsing records, documents, diary entries, "to do" lists, and sound recordings, as well as books, photographs and videos. And they typically include individuals' most personal information in each of these categories.

First, messages to or from family and close friends are often memorialized as emails, text messages, or voicemail messages. The user's own personal thoughts are contained in an electronic diary or notes or other documents. Photographs and video recordings capture an individual's most personal moments.

These devices' extensive storage capacity means that they do not contain messages, personal thoughts, or photographs and videos from only the last several days, or only the last several weeks. Rather, they can and frequently do retain this information from prior months or even years.

Before the development of portable devices with extensive digital storage capability, of course, it would have been impossible for anyone routinely to carry on his or her person more than a few days' worth of these materials. The vast majority of the information that today is stored digitally on these devices would have been stored in the individual's home or office.

Second, electronic appointment calendars on cell phones store sensitive information about a user's daily activities—including appointments with doctors of all types, religious advisors, psychiatrists, therapists, drug or alcohol-treatment groups, grief counselors,

political groups, marital counselors, and fertility consultants, among many others. And, because these calendars preserve past appointments, they provide a detailed, multi-year record of the user's activities—something that individuals would not ordinarily carry every day before the invention of these devices.

Third, modern cell phones also list the telephone calls made from or received by the phone, but typically integrate that data with other information stored on the phone. That integration function often provides the name, address, and other information regarding the individual associated with the particular phone number, such as his or her relationship to the cell phone's owner.[16]

Fourth, the ability of modern cell phones to function as computers—with an incredibly varied capabilities provided by software programs called "applications" or "apps"—means that these devices often perform functions that result in the storage on the device of additional types of information.

Thus, Electronic Health Record (EHR) "apps" are widely available for smartphones; they are used by both medical professionals and patients to keep track of private medical information in electronic form.[17] Other medical information apps include diabetes

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[16] Google's popular Gmail email service, for instance, is linked to its "Contacts" address book feature, which is also linked to its Google+ social network feature. See Alexei Oreskovic, *Google's new Gmail feature linking social network contacts raises privacy concerns*, Financial Post (Jan. 10, 2014, 11:56 AM), http://perma.cc/QL5U-MVM3.

[17] See, *e.g.*, *Compare iPad Electronic Medical Records Software*, Software Advice, http://perma.cc/K3FH-DJLY.

tracking apps,[18] apps to help smokers quit,[19] and Alzheimer's disease apps.[20] These apps result in the storage on the cell phone of users' most intimate medical information.

Personal finance apps cause the storage on the cell phone of similarly sensitive financial information, because they link to bank accounts, keep track of investments, and catalog assets. These apps "extract real-time data from your service providers—including banks, investment houses, lenders, and credit card companies," replacing "the pre-PC days when tracking your expenses involved saving receipts, writing down transactions, [and] opening paper bills."[21]

Again, prior to the development of these storage, communication, and computing technologies, individuals would not carry this information with them every day. Sensitive financial and medical information would be kept at home or in the office, with selected physical documents placed in a purse or briefcase only if needed for a particular purpose on a particular day.

Fifth, many modern cell phones routinely use Global-Positioning-System ("GPS") data to determine

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[18] See, *e.g.*, *The 13 Best Diabetes iPhone & Android Apps of 2013*, Healthline (Aug. 8, 2013), http://perma.cc/UPY9-EGTS.

[19] See, *e.g.*, *Smokefree Apps*, Smokefree.gov, http://perma.cc/4QBP-8DZR.

[20] See, *e.g.*, Rob LeFebvre, *New App For People With Alzheimer's Launches Today, Free For Limited Time*, Cult of Mac (Aug. 19, 2013, 11:00 AM), http://perma.cc/QS9Y-TQT4.

[21] Jill Duffy, *Best Mobile Finance Apps*, PC Magazine (Oct. 8, 2013), http://perma.cc/QS9Y-TQT4.

the phone's location whenever the phone is turned on—because location information is used in many apps.[22] That GPS data is archived, providing a record of the user's movements any time the phone is turned on.[23] The highly personal nature of this information was recognized by the Court in *United States* v. *Jones*. See 132 S. Ct. at 963-964 (Alito, J., with whom Ginsburg, Breyer, and Kagan, JJ., joined, concurring in the judgment); *id.* at 955-956 (Sotomayor, J., concurring).

Moreover, technology is continuing to evolve. New devices such as smart watches and Google Glass will increase the types and amounts of electronically-stored personal information that individuals carry with them each day. Thus, "[a] smartwatch packed with sensors designed to provide body monitoring information could enable many fascinating new data-driven applications, from fitness tracking to mood-linked music commanded by your heartbeat. * * * Apple holds patents for sensory information collection, including blood-pressure monitoring."[24]

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[22] For example, the popular application Foursquare "use[s] the location information from your mobile device to tailor the Foursquare experience to your current location." *Does Foursquare track my location?*, Foursquare Help Center, http://perma.cc/U63C-CHNM.

[23] See Charles Arthur, *iPhone keeps record of everywhere you go*, The Guardian (Apr. 20, 2011), http://perma.cc/S6LC-4UN8. Moreover, cell phone companies also store location data for extended periods, often years. *Cell Phone Location Tracking Request Response—Cell Phone Company Data Retention Chart*, ACLU, http://perma.cc/J2R7-9N6B.

[24] Samuel Gibbs, *Apple's iWatch: What Features Are on Our Wishlist?*, The Guardian (Feb. 4, 2014, 5:14 PM), http://perma.cc/A4V6-D6WN.

Similarly, "Google Glass, the Internet-connected eyewear" could "lead to a world in which people wear or even ingest computers" that monitor and store a wide variety of individuals' personal medical information.[25]

B. The Search-Incident-To-Arrest Exception Does Not Extend To Searches Of Electronically-Stored Data.

The search-incident-to-arrest doctrine is an exception to the Fourth Amendment's generally-applicable requirements of a warrant and probable cause. Given the significant privacy interests at stake, law enforcement officers must obtain a warrant to search digitally-stored data on cell phones and other portable electronic devices.

1. *The Balance Of Interests Underlying The Exception Does Not Support Blanket Authorization Of Warrantless Searches Of Digitally-Stored Personal Information.*

"In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical." *Jones*, 132 S. Ct. at 963 (Alito, J., with whom Ginsburg, Breyer, and Kagan, JJ., joined, concurring in the judgment). That is particularly true of the search-incident-to-arrest exception.

The exception has deep roots. A century ago this Court stated that it was "always recognized under

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[25] Claire Cain Miller, *Google Glass to Be Covered by Vision Care Insurer VSP*, N.Y. Times (Jan. 28, 2014), http://perma.cc/H6AR-96YG. Indeed, digital devices such as pacemakers already installed in the human body can store data such as one's heart rate and breathing rate. *What Is a Pacemaker?*, National Heart, Lung, and Blood Inst., http://perma.cc/4UCA-XEQB.

English and American law." *Weeks* v. *United States*, 232 U.S. 383, 392 (1914); see also *Virginia* v. *Moore*, 553 U.S. 164, 170 (2008) ("[S]earches incident to warrantless arrests * * * were * * * taken for granted at the founding.") (quotation marks omitted).

At that time, the amount of personal information that an arrestee could carry on his person or have within his control was quite limited. Information could be carried only in physical form—as papers (and later as photographs).

Because of that physical limitation, individuals typically carried with them only the documents needed for that day's activities, plus whatever else might be useful provided that it would fit in a wallet, address book, or briefcase or purse. Individuals did not (and could not) routinely carry large amounts of personal correspondence, photograph albums (or painted family portraits), financial records, or other private information. That information was stored in the individual's home or office.

From the time of its creation until very recently, therefore, the exception had a built-in limitation: the amount of paper that an individual could carry on his or her person or have within his or her reach at the time of arrest. See *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (holding that a search incident to arrest encompasses the arrestee's person and space "within his immediate control").

That physical reality, and the exception's resulting inherent limitation, explains why the search-incident-to-arrest exception was fully compatible with the Founders' determination to prohibit the general warrants and writs of assistance authorizing indiscriminate searches. See, *e.g.*, *Chimel*, 395 U.S.

at 761; *Weeks*, 232 U.S. at 390 (discussing the Fourth Amendment's origin). Because individuals did not routinely carry all, most, or even many of their private papers with them each day, there was no danger that the exception would be abused to permit rummaging through an individual's most private papers—those papers were safely at home, where, even after the homeowner's arrest, a warrant would be required to search them.

Modern technology has fundamentally changed the amount and nature of the personal information that an individual typically carries and has within his or her reach.

To take one example, the Library of Congress's collection of James Madison's papers consists of approximately 72,000 pages of documents.[26] Madison did not and could not carry those documents on his person—they would have weighed at least 675 pounds.[27] They were kept in his home and in the homes of his correspondents.

Today, however, a cell phone can contain more than 100 times the number of pages in the entire Madison collection.[28] Digital data storage makes it possible for Americans to carry with them every day vast quantities of sensitive information that previously was kept within their homes. See pages 5-13,

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[26] See *James Madison Papers*, Library of Congress, http://perma.cc/LPS5-45NG.

[27] *How Much Does a Ream of Paper Weigh?*, Ask.com, http://perma.cc/7WQ5-2HCB (noting that a ream of paper weighs approximately 4.7 pounds).

[28] Assuming 400 words per page, a 16 GB iPhone can hold 800 million words, or 2 million pages. See note 9, *supra*. A 64 GB iPhone can hold 8 million pages.

supra. Moreover, the breadth of that information would likely reveal an individual's medical history, religious beliefs, political affiliations, network of friends, colleagues, intimate associates, and acquaintances.

Allowing law enforcement officers to conduct warrantless searches of this electronically-stored information therefore cannot be justified based on precedents that necessarily rest on the much narrower intrusion on privacy interests that could possibly have resulted from searches-incident-to-arrest of physical, rather than digital, materials. Given the dramatically broader intrusion that would result from a blanket authorization of warrantless searches of all digitally-stored information—akin to the significant intrusion that the Fourth Amendment was intended to prevent—those precedents cannot support extension of the exception into this new context.

Indeed, the United States' mechanical invocation of precedent divorced from context here closely resembles the argument that the government advanced—and a majority of the Court rejected—in *United States* v. *Jones*. There, the government argued that precedents finding no reasonable expectation of privacy in an individual's movements on public streets, because of police officers' ability to observe those movements, meant that GPS tracking did not constitute a Fourth Amendment search.

A majority of the Court rejected that argument. 132 S. Ct. at 964 (Alito, J., with whom Ginsburg, Breyer, and Kagan, JJ., joined, concurring in the judgment) (finding a Fourth Amendment search because "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and

catalogue every single movement of an individual's car for a very long period"); *id.* at 956 (Sotomayor, J., concurring) (recognizing that the "attributes of GPS monitoring" must be taken "into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements"); see also *Kyllo*, 533 U.S. at 34 (refusing to "permit police technology to erode the privacy guaranteed by the Fourth Amendment").

Fourth Amendment search-incident-to-arrest decisions that rest upon completely inapplicable assumptions should be held inapplicable here for the same reason. New technology permits a very substantial intrusion on core Fourth Amendment interests that was not anticipated, and could not have been anticipated, when the search-incident-to-arrest exception was recognized.

The federal government argues that the doctrine is nonetheless applicable, repeatedly referencing "the reduced expectations of privacy triggered by the fact of arrest." No. 13-212 U.S. Br. 19. This Court, however, has rejected the notion that "any search is acceptable solely because a person is in custody. Some searches, such as invasive surgery, or a search of the arrestee's home, involve either greater intrusions or higher expectations of privacy." *Maryland* v. *King*, 133 S. Ct. 1958, 1979 (2013) (internal citations omitted). If "the privacy-related concerns are weighty enough * * * the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Ibid.*

Here, the intrusion on privacy interests from routine searches of digitally-stored information would be very substantial, because of the large amounts of personal information stored on portable

electronic devices. And, as we next discuss, neither the law enforcement interests underlying the search-incident-to-arrest exception nor other law enforcement interests come close to justifying warrantless searches of this information.

2. *The Justifications For The Search-Incident-To-Arrest Exception Do Not Apply To Electronically-Stored Data.*

In *Chimel* v. *California*, 395 U.S. 752 (1969), the Court explained the "analysis [that] underlies the 'search incident to arrest' principle, and marks its proper extent." *Id.* at 762; accord *Arizona* v. *Gant*, 556 U.S. 332, 343 (2009) (refusing to "untether" the exception from *Chimel*'s justifications).

The federal government argues that *Chimel* is irrelevant, because the Court's decision in *United States* v. *Robinson*, 414 U.S. 218 (1973), recognizes plenary authority to search any object found on the arrestee's person. See No. 13-212 U.S. Br. 17-28. That contention is wrong for two reasons.

To begin with, it ignores the fundamentally different question presented by application of the search-incident-to-arrest exception to digitally-stored information. For the reasons discussed above, any such blanket rule should not be extended to this extremely different context.

But the government's argument is also wrong on its own terms. *Robinson*'s focus was the lower court's narrow view of a police officer's authority to search an arrestee—the court of appeals had held that the officer "may not ordinarily proceed to fully search the prisoner" but could only "conduct a limited frisk of the outer clothing and remove such weapons that he may, as a result of that limited frisk, reasonably be-

lieve and ascertain that the suspect has in his possession." 414 U.S. at 227.

This Court squarely rejected that conclusion, holding that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.* at 235. That holding says nothing about searches of objects found on the arrestee's person.

Only one sentence of the *Robinson* opinion addressed that question. The Court stated: "Having in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them * * *." *Id.* at 236.

The Court did not explain why the officer was "entitled to inspect" the package. Most likely, it was because, as the government itself argued in *Robinson*, that further search was justified to determine that the package did not contain a weapon. See No.13-132 Pet. Br. 18 (discussing government's argument).

But the Court's unexplained conclusory statement certainly provides no basis for transforming *Robinson*'s holding—that officers may conduct a full search of the arrestee's person—into authority for officers to conduct a full search of everything found on his person, even if *Chimel*'s justifications do not apply.

That is especially true because, as the government acknowledges, the officers' ability to search without a warrant objects not found on the arrestee's person does turn on whether those justifications are

present. No. 13-212 U.S. Br. 21-23. In the government's view, therefore, it may download the full contents of a cell phone without a warrant if the phone is in the arrestee's pocket, but it may not do so if the phone is on the seat next to him. Given the very substantial amount of personal information involved, it is nonsensical for the warrant requirement to turn on such a distinction.

The question in both situations is whether the *Chimel* justifications for the search-incident-to-arrest exception apply. And neither of the two rationales identified in *Chimel* permits searches of the electronically-stored contents of a cell phone.

First, the exception rests on the determination that "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape." *Chimel*, 395 U.S. at 763. Removal of the mobile phone from the arrestee's possession and examination by the officers to ensure that it is not a disguised weapon (and that it cannot be used by the arrestee to summon his confederates) are all that is necessary to fulfill that purpose.

Second, "it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763. The sole concern is the risk of concealment or destruction of evidence *by the arrestee*. *Chimel* explained that the justification extends to a search of "the area 'within his immediate control'—construing that phrase to mean the area from within which [the arrestee] might gain possession of * * * destructible evidence." *Ibid.*

That is why "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest *only when* the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 U.S. at 343 (emphasis added); see also *United States* v. *Chadwick*, 433 U.S. 1, 15 (1977) (stating that once the officers had "exclusive control," "there [was] no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence"), abrogated on other grounds by *California* v. *Acevedo*, 500 U.S. 565 (1991).

Once law enforcement officers have arrested an individual and seized his or her cell phone, there is no possibility that the arrestee himself will be able to act to delete the information it contains. Accordingly, the "preservation of evidence" prong of *Chimel* is also inapplicable.

The government argues (No. 13-212 U.S. Br. 34-40) for a much more expansive interpretation of this aspect of *Chimel*, asserting that the mere possibility that evidence might be destroyed by the actions of a third party or through a device previously installed by the arrestee is sufficient to trigger the exception. It points to the availability of cell phone "wiping" technology that may be activated by a signal sent by a third party or by the arrestee's failure to enter a code at specified time intervals. *Id.* at 37-39.

That argument is flawed on multiple grounds. To begin with, the consequences of expanding *Chimel*'s rationale to encompass the risk that the arrestee may have taken prior action that would result in destruction of evidence or that third parties would act to destroy evidence would dramatically broaden the government's authority. It always is possible that an

arrestee also could have instructed his accomplices to destroy evidence if he did not return to his home by a specified time. Does that mere possibility mean that officers may undertake a warrantless search of every arrestee's home? Does the possibility that a closed container might be booby-trapped to destroy any incriminating materials that it contained mean that police officers may override *Chadwick*'s limitation on the exception?

No decision of this Court endorses such a broad approach. As we have discussed, this Court has made clear that a search is not permissible once the arrestee cannot gain possession of the potential evidence—which will always be the case after the phone has been seized by the officers.[29]

Moreover, there is no support for the government's implicit contention that the use of wiping technologies is widespread and cannot be counteracted, or that the use of passwords—common in a variety of other contexts—somehow justifies expanding the exception. See No. 13-132 Pet. Br. 22-24.

Finally, "a broad reading of [*Chimel*] is also unnecessary to protect law enforcement * * * evidentiary interests." *Gant*, 556 U.S. at 346. As was the case with respect to the overbroad construction of the search-incident-to-arrest exception rejected in *Gant*, "[o]ther established exceptions to the warrant requirement authorize [searches] under additional cir-

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[29] As we discuss below (at page 28), the government's argument is really a claim for an across-the-board determination that searches of digitally-stored information are always justified by exigent circumstances–something that is not permissible under exigent search principles.

cumstances when safety or evidentiary concerns demand." *Ibid.*

A warrant is not required if "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006) (quoting *Mincey* v. *Arizona*, 437 U.S. 385, 393-394 (1978)). One such circumstance occurs when an officer is faced with "the imminent destruction of evidence." *McNeely*, 133 S. Ct. at 1559; see, *e.g.*, *Illinois* v. *McArthur*, 531 U.S. 326, 331 (2001) (concluding that a warrantless seizure of a person to prevent him from returning to his trailer to destroy hidden contraband was reasonable "[i]n the circumstances of the case before us" due to exigency); *Cupp* v. *Murphy*, 412 U.S. 291, 296 (1973) (holding that a limited warrantless search of a suspect's fingernails to preserve evidence that the suspect was trying to rub off was justified "[o]n the facts of this case").

"'[T]he fact-specific nature of the reasonableness inquiry,' demands that we evaluate each case of alleged exigency based 'on its own facts and circumstances.'" *McNeely*, 133 S. Ct. at 1559 (internal citations omitted). If officers have specific knowledge that the contents of a particular phone may be lost due to a wiping program or some other technology, and they believe that the contents cannot be preserved while they seek a warrant, they may be able to satisfy the exigent circumstances test.

Importantly, that exigency could justify only the downloading of the digitally-stored information for purposes of preservation, not a search of that information (police patrol cars increasingly are outfitted with the technology to perform such downloads at

the time and place of arrest). A warrant still would be needed to search the information.

Law enforcement officers also do not need a warrant to observe items within their "plain view." "[A] truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a 'search' for Fourth Amendment purposes, and therefore does not even require reasonable suspicion." *Arizona* v. *Hicks*, 480 U.S. 321, 328 (1987).

If an incoming call, text message, or other information appears on the face of the phone, an officer may view that information without a warrant. That aspect of the officers' actions in *Wurie* was permissible. 13-212 Pet. App. 2a ("[O]ne of Wurie's cell phones * * * was repeatedly receiving calls from a number identified as 'my house' on the external caller ID screen on the front of the phone[and] [t]he officers were able to see the caller ID screen, and the 'my house' label, in plain view.").

But by going on to "open[] the phone" and press a button to "access the phone's call log," review the call log, and "press[] one more button" to search for the suspect's contact information (Pet. App. 3a), the officers moved beyond merely observing information in plain view. The plain view doctrine accordingly cannot justify the federal government's use of the information gained from the officer's manipulation of the phone.[30]

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[30] Police officers also may conduct "inventory searches"—"[a]t the stationhouse, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed." *Illinois* v. *Lafayette*, 462 U.S. 640, 646 (1983). An officer therefore could ob-

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This Court in *Gant* rejected an expansive interpretation of the search-incident-to-arrest exception in part because it "seriously undervalue[d] the privacy interests at stake." 556 U.S. at 344-345. Law enforcement officers would have been able "to search not just the passenger compartment [of the car] but every purse, briefcase, or other container within that space." *Id.* at 345.

Permitting the police to conduct such a search in connection with every single traffic offense arrest would have "create[d] a serious and recurring threat to the privacy of countless individuals. Indeed, the character of the threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Ibid.*

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serve the exterior of an arrestee's cell phone and include it on the list of the arrestee's property.

"[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." *Florida* v. *Wells*, 495 U.S. 1, 4 (1990). It therefore cannot justify a search of the data that is electronically stored on the phone. *United States* v. *Davis*, 787 F. Supp. 2d 1165, 1170 (D. Or. 2011) ("[A] lawful inventory search does not authorize an officer to examine the contents of a cell phone."); *United States* v. *Wall*, 08-60016-CR, 2008 WL 5381412, at *4 (S.D. Fla. Dec. 22, 2008), *aff'd*, 343 F. App'x 564 (11th Cir. 2009) ("[T]he Government cannot claim that a search of text messages on [defendant's] cell phones was necessary to inventory the property in his possession. Therefore, the search exceeded the scope of an inventory search and entered the territory of general rummaging."); *United States* v. *Flores*, 122 F. Supp. 2d 491, 494 (S.D.N.Y. 2000) ("[N]either a calendar book nor a cellular telephone is a 'container' that has 'contents' that need to be inventoried for safekeeping in the traditional sense of those terms.").

The broad argument advanced by California and the United States in these cases would, if accepted by this Court, enable police officers to "rummage at will" among individuals' most sensitive personal information—the very types of information whose protection was a core purpose of the Fourth Amendment. That argument should be rejected by this Court here, as it was in *Gant*.

C. The Court Should Reject An Exception To The Warrant Requirement Permitting Searches Of Digitally-Stored Information For Evidence Of The Offense Of Arrest.

The federal government urges the Court to recognize a new exception to the Fourth Amendment's warrant requirement that would allow searches of digitally-stored information on cell phones (and presumably any other portable electronic device) whenever an officer has "reason to believe that it contains evidence of the offense of arrest." 13-212 U.S. Br. 45. The Court should reject that argument and reaffirm that a warrant is required to search these large collections of highly personal information.

Although the government relies on *Gant*, that decision actually weighs against the government's argument. The Court there concluded that "*circumstances unique to the vehicle context* justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" 556 U.S. at 343 (emphasis added). It did not adopt the general rule urged by the government here, which would not be limited to the vehicle context but rather would apply across-the-board to any place an arrest occurs and to any item found on the individual's person.

That enormous expansion of the government's authority to conduct warrantless searches is contrary to both precedent and the principles underlying the Fourth Amendment.

The government's argument rests largely on *United States* v. *Rabinowitz*, 339 U.S. 56 (1950); see 13-212 U.S. Br. 16 (citing *Rabinowitz*); *id.* at 46 (citing *Thornton* v. *United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring) (relying on *Rabinowitz*)).

But *Chimel* expressly rejected that broad interpretation of *Rabinowitz*, stating that "*Rabinowitz* has come to stand for the proposition, *inter alia*, that a warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested"; that *Rabinowitz* had been thus "limited to its own facts"; and that a broad construction of the decision was inconsistent with other decisions of this Court and not "supported by a reasoned view of the background and purpose of the Fourth Amendment." 395 U.S. at 759-760. Adopting the government's argument would therefore be inconsistent with *Chimel*.

Searches of digitally-stored information are a particularly inappropriate context in which to adopt a new exception to the warrant requirement, because such a search inevitably will allow police officers to rummage through a large volume of extremely personal information. As discussed above, that is the precise sort of search that led to the adoption of the Fourth Amendment's requirement of a warrant.

Moreover, the government never explains why a warrant requirement would be burdensome in this context. Where officers have secured the portable

electronic device, and there are no exigent circumstances, it should be possible to obtain a warrant in short order. *McNeely*, 133 S. Ct. at 1562-63.

A warrant also serves the important purpose of tailoring the scope of the officers' search of digitally-stored information to fit the justification for the search. See *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987) (explaining that Fourth Amendment requires that a warrant be limited "to the specific areas and things for which there is probable cause to search" in order to avoid "tak[ing] on the character of the wide-ranging exploratory searches the Framers intended to prohibit"). Given the large amount of sensitive personal information contained on these devices, it often will be appropriate to limit the search to the particular type of information to which the officers' probable cause relates.

The government appears to argue that the police officer's determination that there is reason to believe that the device contains evidence of the crime, and the officer's determination of the appropriate scope of the search, are sufficient substitutes for the judgment of a detached magistrate. But the Framers concluded otherwise, based on their experience with abuses of government investigatory authority, and therefore specifically included the warrant requirement in the text of the Fourth Amendment.

Given the particular importance of the warrant requirement in the context of searches of personal papers and other personal information, the absence of any demonstrated burden on law enforcement, and this Court's precedents, the government's argument should be rejected.

D. A Bright-Line Rule Requiring A Warrant For Searches Of Digitally-Stored Information Will Be Much Easier For Officers To Apply Than Other Proposed Standards.

The Court has consistently recognized the benefits of bright-line rules in the Fourth Amendment context. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979). "[I]f police are to have workable rules, the balancing of the competing interests * * * 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'" *Michigan* v. *Summers*, 452 U.S. 692, 705 n.19 (1981) (quoting *Dunaway*, 442 U.S. at 219-220 (White, J., concurring)).

Requiring a warrant for searches of digitally-stored information would provide clear guidance to police officers. Once the officers concluded that they wanted access to information stored on a portable electronic device, and the relevant information was not in plain view, they would know that a warrant is required (absent case-specific exigent circum-

stances).[31] Other proposed standards would create confusion and uncertainty.

1. There Are No Clear Distinctions Between "Smart" And "Dumb" Cell Phones.

No easily ascertainable set of characteristics separate "smart" from "dumb" cell phones—to the contrary the two categories overlap significantly. Thus, the TracFone Prepaid Cell Phone, sold at Walmart for $14.88, includes mobile web access, video recorder, instant messaging, an MP3 player, voice recorder with playback capability, a camera, text messaging capability, a calendar, and a phonebook that can hold 1,000 entries. *TracFone LG440G Cell Phone*, Walmart, http://perma.cc/RDR2-JCLY; see also note 6, *supra*.

Certainly phones are not labeled "smart" or "dumb." Police officers cannot be expected to stay abreast of the latest cell phone developments to distinguish quickly between the myriad of different phone models. And many recent "dumb" phones have the sleek design typically associated with smart phones.[32]

Moreover, cell phones are only one of the many categories of portable electronic devices to which police officers would have to apply this hazy distinc-

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[31] The burden of obtaining a warrant is no greater in this context than it is in other contexts in which there is no exception to the general standard prescribed by the Fourth Amendment. And advances in technology have made it much easier to obtain a warrant expeditiously. *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1562-1563 (2013).

[32] See, *e.g.*, Stephanie Mlot, *'Premium' Nokia 515 Feature Phone Unveiled*, P.C. Magazine (Aug. 28, 2013, 4:06 PM), http://perma.cc/N3ZJ-C8SQ.

tion. They also would have to be knowledgeable about different models of tablets, laptops, and digital cameras, among other devices.

Finally, any distinction along these lines would quickly become obsolete. As technology advances, production of today's "dumb" devices will cease, today's "smart" devices will become relatively "dumber," and new "smarter" smart devices will enter the marketplace.

Officers on the street simply could not keep themselves aware of the information needed to apply this distinction, assuming that some distinction between types of devices could even be delineated. The result would be rampant confusion.

2. Permitting Law Enforcement Officers To Access Only Certain Types Of Digitally-Stored Information Is Wholly Impractical.

Modern cell phones and other portable electronic devices do not limit a user's access to particular categories of information. To the contrary, the stored information is not compartmentalized and one of the purposes of the phone's applications is to link the various types of information to improve the phone's utility.

For example, "many of the most popular smartphone apps for Apple and Android devices— Twitter, Foursquare and Instagram among them— routinely gather the information in personal address books" for use in those apps.[33] The National Security Agency

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[33] Nicole Perlroth & Nick Bilton, *Mobile Apps Take Data Without Permission*, N.Y. Times (Feb. 15, 2012, 9:05 AM), http://perma.cc/VZP7-R4TR.

found that certain popular phone apps access sensitive personal information contained on the phone relating to location, age, gender, and sexual orientation.[34] Because data on the phone is so interconnected, a rule permitting police to search some subset of the information simply is not workable.

Moreover, permitting an officer to "look at" only the phone's call log opens the door to fishing expeditions. Police officers will claim that "in the process of" finding the call log they accidentally happened upon other information—a diary, photographs, text messages, emails—and that the other information is admissible on "plain view" grounds. The Court should not adopt a legal standard susceptible to such manipulation, particularly in light of the highly personal nature of the large amounts of information stored on these devices.

An additional flaw in this approach is that a police officer on the street, in the heat of the moment of arrest, often will not be able to determine whether the data he or she is accessing is stored on the electronic device or stored remotely on a server. The federal government acknowledges (No. 13-212 U.S. Br. 34-44) that the search-incident-to-arrest exception cannot justify searches of remotely-stored information. That fact weighs heavily against permitting warrantless searches of particular categories of information.

Apps on cell phones seamlessly integrate local and remotely stored data, making it all but impossi-

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[34] James Ball, *Angry Birds and 'Leaky' Phone Apps Targeted by NSA and GCHQ for User Data*, The Guardian (Jan. 28, 2014, 2:51 AM), http://perma.cc/3LKY-YDWR.

ble to tell where exactly the data displayed on the screen is coming from. In fact, official design principles for both Apple's iOS operating system for iPhones and Google's Android operating system *emphasize* a user experience that obfuscates the difference between local and remote data for the end user. See *iOS Human Interface Guidelines* 62 (2014), http://perma.cc/M5DA-24DR ("[P]eople shouldn't be faced with anything that encourages them to think about file metadata or locations[.]"); *id.* at 101-102 ("Ideally, users don't need to know where their content is located[.] * * * Avoid asking users to choose which documents to store in iCloud."); *Design Principles*, Android Developer, http://perma.cc/N534-576H ("Save what people took time to create and let them access it from anywhere. Remember settings, personal touches, and creations across phones, tablets, and computers.").

Some apps provide a live video feed into a person's home—and more. See, *e.g.*, Somak R. Das et al., *Home Automation and Security for Mobile Devices*. 2011 IEEE International Conference on Pervasive Computing and Communications Workshops 141, 141 (describing the design of a phone-app-based system that "operates and controls motion detectors and video cameras for remote sensing and surveillance, streams live video and records it for future playback, and finally manages operations on home appliances, such as turning ON/OFF a television or microwave or altering the intensity of lighting around the house"). Cf. *Kyllo*, 533 U.S. at 35-36 (discussing "imaging technology that could discern all human activity in the home").

An officer could not reliably determine whether, by opening an app, he was looking at a local copy of a

stored email or at emails stored remotely, or whether the personal pictures found were stored on the phone or were instead located on the user's private online photo album (or another individual's online photo album). Law enforcement officers will not be able to make a distinction that is designed by software developers to be essentially invisible.

3. Distinguishing Between Searches At The Place Of Arrest And Searches At The Police Station Would Increase The Intrusion On Privacy Interests Protected By The Fourth Amendment.

The petitioner in No. 13-132 suggests (Pet. Br. 44-53) that the Court could resolve that case by holding that a search conducted remotely from the time and place of arrest violates the Fourth Amendment. Whatever the legal merit of that proposition (compare *United States* v. *Edwards*, 415 U.S. 800 (1974)), a legal standard that permits searches at the time and place of arrest would open the door to warrantless searches of large volumes of highly personal information.

To begin with, such a standard would not impose any practical limitation on these searches. Police cars today typically are outfitted with laptop computers and other devices that can be used to download and search digitally-stored information. Thus, one global survey found that 44% of respondents "now extract mobile data in the field." *Trends shaping mobile forensics in 2014*, http://perma.cc/R8EA-GBP2.

A legal rule that permits police to search all digitally-stored data at the place of arrest without a warrant, but requires a warrant for any subsequent

search, would create a strong incentive *always* to search that information at the scene—and therefore is likely to produce more frequent warrantless searches of this personal information and therefore greater intrusions on the privacy interests protected by the Fourth Amendment.

CONCLUSION

The judgment of the court of appeal in No. 13-132 should be reversed and the judgment of the court of appeals in No. 13-212 should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

DAVID LEON RILEY,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

v.

BRIMA WURIE,
Respondent.

On Writs of Certiorari to the California Court of Appeal, Fourth District and the U.S. Court of Appeals for the First Circuit

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Brief of Constitutional Accountability Center as *Amicus Curiae* in Support of Petitioner Riley and Respondent Wurie

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The text and history of the Fourth Amendment establish that police may not engage in generalized searches lacking in individualized suspicion. Indeed, the Framers adopted the Fourth Amendment in large part to guard against the significant intrusions into privacy that could result if the government enjoyed unlimited discretion to search people's homes and belongings. In an age when people keep vast stores of personal information and documents on their cell phones

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

and other digital devices, the invasion of privacy involved in searches of those devices will often be similar in degree to (if not more substantial than) the intrusion on privacy that results from the search of an individual's home, personal papers, and effects. By permitting the police to search the digital contents of an arrestee's cell phone without first obtaining a warrant, even after the phone has been removed from the arrestee, the California Supreme Court and other courts around the country have given the police unfettered discretion to engage in broad invasions of individual privacy. These decisions should not be allowed to stand.

When the Framers drafted the Fourth Amendment, which broadly provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," they were responding, in large part, to the British use of "general warrants" and "writs of assistance." These warrants and writs lacked any specificity about the people or items to be searched and were not predicated on any individualized suspicion; essentially unlimited in scope, these warrants and writs allowed the officers executing them virtually unfettered discretion to engage in broad searches of a person's home and the personal papers and effects in that home.

As early as the 1600s, the use of such warrants came under attack in Great Britain. They were decried as an instrument of arbitrary power, and popular opposition to them quickly solidified as they were used to harass critics of the Crown and trample personal liberty. The British nonetheless continued to use general warrants, including in the colonies. During the 1700s, colonial opposition to the use of such warrants grew, and their use was one of the grievances that prompted the call for independence from British rule.

Concerns about the abusive use of general warrants continued in the post-colonial period, and calls for the nation's new Constitution to include an explicit prohibition on the use of general warrants produced what would become the Fourth Amendment. The text of the Fourth Amendment, both as originally drafted and in the form that was ultimately adopted, reflects the Framers' staunch opposition to the use of general warrants. It required not only that all searches be reasonable, but also that all warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. This detailed text enshrines a specific prohibition against general warrants in our nation's charter, and reflects the Framers' more general concern that government officers not be able to search a person's home, papers, and effects in the absence of some individualized, justified suspicion that a specific search would produce evidence of wrongdoing. Stated simply, the Framers wanted to strip the government of the arbitrary power to

rifle through a person's belongings in the hope of finding something incriminating.

The searches in the cases now before the Court both violated this fundamental Fourth Amendment precept. The contents of Petitioner David Riley's cell phone were searched without a warrant and without exigent circumstances, first at the scene of his arrest and then hours later at the police station. Similarly, Respondent Brima Wurie's phone was searched without a warrant and without exigent circumstances. None of the traditional justifications for warrantless searches incident to a lawful arrest can justify the searches of these cell phones—the phones had been removed from the defendants, thus eliminating any concern about destruction of evidence, and it is difficult to see how the text messages, emails, photos, call logs, and other digital contents of the phones could have posed any threat, let alone an imminent threat, to the arresting officers' safety. To the contrary, as the detective who searched Riley's phone hours after the arrest acknowledged, he dug through "'a lot of stuff" on the phone specifically "'looking for evidence.'" Riley J.A. 11, 20. These are precisely the type of searches for which the Constitution demands a warrant.

Allowing law enforcement officers to look through the contents of an arrestee's cell phone without a warrant and in the absence of recognized exigent circumstances invites law enforcement to engage in the same sort of generalized searches that the Framers abhorred—and adopted the Fourth Amendment to prevent. Because modern

cell phones generally contain significant amounts of information, often including sensitive communications and private photographs, the intrusion into an individual's privacy when police rummage through the contents of these phones, particularly smart phones, is substantial. Indeed, because a person may store much of his most private information on his cell phone, the invasion of privacy involved in such searches will often be more substantial than the intrusion on privacy that occurred when individuals' homes—and their personal papers and effects—were searched by overreaching British colonial officers during the Founding era. This Court should hold that, absent exigent circumstances, the warrantless search of an arrestee's cell phone violates the Fourth Amendment.

ARGUMENT

By permitting the police to search the digital contents of an arrestee's cell phone without first obtaining a warrant, even after the phone has been removed from the arrestee, the California Supreme Court and other courts around the country have given the police unfettered discretion to engage in broad invasions of individual privacy. It was just this sort of generalized search, undertaken without probable cause or particularized suspicion, that the Fourth Amendment was adopted to prevent. This Court should hold that the Fourth Amendment's text and history prohibit warrantless searches like the ones that took places in the cases now before the Court.

I. The Framers Viewed the Fourth Amendment as a Fundamental Protection Against the Use of "General Warrants"

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. As the text suggests, the Framers incorporated this fundamental safeguard of liberty into the Constitution to limit the discretion of government officers to engage in general searches unsupported by specific, articulable suspicion, and to prevent the broad invasions of privacy that such searches could entail. This safeguard was "indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895 (1833).

The Fourth Amendment's broad protections were in large part a response to specific abuses the Framing generation had suffered under British rule—namely, the use of "general warrants" and "writs of assistance" that lacked specificity as to the person and place to be searched and were not based on any individualized suspicion. *See, e.g.*, *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) ("It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the

colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England."); *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting) (noting that the Framers "despised" the use of general warrants); Hon. M. Blane Michael, Madison Lecture, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. Rev. 905, 906 (2010) (noting that "the British Crown's unbridled power of search . . . is at the center of the rich history that led to the adoption of the Fourth Amendment"); *id.* at 907 ("The Fourth Amendment owes its existence to furious opposition in the American colonies to British search and seizure practices, particularly in the area of customs enforcement."). As Joseph Story observed, the Fourth Amendment's "introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution." STORY, COMMENTARIES § 1895. Such warrants were despised by Americans as the tools of an arbitrary and unlimited government, used to harass and oppress the people.

General warrants had long been used in Great Britain. For example, the Act of Frauds of 1662 "empowered customs officers in England to enter 'any house, shop, cellar, warehouse or room, or other place' and to 'break open doors, chests, trunks and other package[s]' for the purpose of seizing any 'prohibited and uncustomed' goods."

Michael, 85 N.Y.U. L. Rev. at 907.[2] These warrants were also used to limit the publication of materials critical of the government. *See Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Mo.*, 367 U.S. 717, 726 (1961) (noting that in the mid-seventeenth century, the Parliament's asserted need for "a broad search and seizure power to control printing" resulted in the issuance of warrants that "often gave the most general discretionary authority"); *see also id.* at 724 ("Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.").

As early as the mid-1600s, the use of these general warrants came under attack in Great Britain when Edward Coke "became the first of many English legal thinkers to deny the legality of general warrants." WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 105 (2009). "By the end of the century, at least four legal treaties had mentioned Coke's language against general warrants as legal fact," *id.* at 121, and the popularity of Coke's views continued to spread in the ensuing years, as other "legal treatises recited Coke on general warrants as doctrine," *id.*

Despite the growing opposition to the use of general warrants in Great Britain, they remained

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[2] In 1696, "the broad enforcement powers in the 1662 Act" were extended "to customs officers in the colonies, authorizing the officers to conduct warrantless searches at their discretion." Michael, 85 N.Y.U. L. Rev. at 907.

the standard method of search in the colonies as of the mid-eighteenth century. *See* Tracy Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 940 (1997). Colonial opposition to the use of general warrants was galvanized by a series of events on both sides of the Atlantic on the eve of the American Revolution.

In the high-profile Paxton's Case, for example, a group of Boston merchants challenged customs officials' use of general warrants, CUDDIHY, THE FOURTH AMENDMENT, at 380, attacking them as "'the worst instrument of arbitrary power, the most destructive of English liberty . . . that ever was found in an English law-book.'" Michael, 85 N.Y.U. L. Rev. at 908. The merchants' attorney, James Otis, argued that such warrants "place[] the liberty of every man in the hands of every petty officer." JAMES OTIS, IN OPPOSITION TO WRITS OF ASSISTANCE, http://bartleby.com/268/8/9 (last visited July 24, 2013); *see* Michael, 85 N.Y.U. L. Rev. at 908 (noting that Otis called the writ of assistance an "'instrument[] of slavery on the one hand, and villainy on the other'"). According to Otis, writs of assistance could be legal only if they were much more specific, providing for the "search [of] *certain houses* &c. *especially set[ting] forth*, . . . *upon oath made* . . . by the person who asks *that he suspects such goods to be concealed in* THOSE VERY PLACES HE DESIRES TO SEARCH." CUDDIHY, THE FOURTH AMENDMENT, at 377-78 (quoting Brief of Otis, *Paxton's Case* (Mass. Sup. Ct. 24-26 Feb. 1761), *Massachusetts Spy*, Thu., 29 Apr. 1773 (vol. 3, no. 117), p. 3, col. 1). Although the writs in

Paxton's Case were granted, the decision prompted public resistance, and the Massachusetts legislature responded by reducing the judges' salaries and passing a law requiring the use of specific warrants. CUDDIHY, THE FOURTH AMENDMENT, at 403-04; *cf.* Michael, 85 N.Y.U. L. Rev. at 908 (noting that this case "galvanized support for what became the Fourth Amendment").

In the years that followed, colonial opposition to general warrants continued to grow, in part in response to events in Great Britain. When a publication was released that criticized the King, the British Secretary of State issued a general warrant to authorize sweeping searches of forty-nine individuals who might be responsible. John Wilkes, the primary target of the investigation, sued those responsible for executing the warrant. In one of the resulting trials, Chief Justice Pratt of the Court of Common Pleas declared general warrants to be "illegal, and contrary to the fundamental principles of the constitution." *Wilkes v. Wood*, 98 Eng. Rep. 489, 499 (1763). This case was widely covered in American newspapers, and "the reaction of the colonial press to that controversy was intense, prolonged, and overwhelmingly sympathetic to Wilkes." CUDDIHY, THE FOURTH AMENDMENT, at 538; *see id.* at 539 (discussing the scope of the coverage in the colonial press); *id.* at 538 (noting that a "revulsion to general warrants ensued in the colonies" following the Wilkes controversy); *cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1176 (1991) ("Madison's choice of language [in the Fourth

Amendment] may well have been influenced by the celebrated 1763 English case of Wilkes v. Wood, one of the two or three most important search and seizure cases on the books in 1789." (internal footnote omitted)).[3]

Despite the growing opposition to general warrants, Parliament in 1767 again authorized their use in the colonies. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 566 (1999). Some of the local courts in the colonies resisted, refusing to issue the broad, general writs authorized by the Act and instead issuing the more specific warrants lauded by Otis. CUDDIHY, THE FOURTH AMENDMENT, at 519. But "[g]eneral warrants and affiliated methods were still central to colonial search and seizure in 1776." *Id.* at 538.

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[3] The Wilkes controversy also brought to the fore the public's opposition to the search and seizure of private papers. *See* Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 887-94 (1985). The search and seizure of private papers was viewed as a particularly intrusive invasion of privacy because, in part, such papers often "contain[ed] an individual's most private thoughts" and could "expose [the] confidences" of other people. *Id.* at 890. Moreover, "[b]ecause papers cannot so easily be distinguished from each other, a typical search for a document is necessarily a rummaging search of the most intrusive kind." *Id.* at 918. This controversy and the ensuing debates in Britain also influenced thinking in the colonies and helped shape the protections provided by the Fourth Amendment. *See id.* at 920 ("Read in light of its historical background, the fourth amendment's search and seizure clause condemns the inspection of innocent private papers by government officials in search of a document that by itself may be unprotected.").

The colonists' animosity toward general warrants was one of the grievances that caused them to seek independence from Great Britain. As John Adams would later remark, Otis's fiery attack on the practice in *Paxton's Case* "was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." Michael, 85 N.Y.U. L. Rev. at 909 (quoting Letter from John Adams to William Tudor (March 29, 1817) *in* THE WORKS OF JOHN ADAMS 247-48 (Boston, Little Brown & Co. 1856)). Indeed, the colonists attached great importance to the issue of general warrants as they contemplated breaking ties with Great Britain. *See, e.g., id.* at 911 ("the First Continental Congress in 1774 included customs searches under general writs of assistance in its list of grievances against Parliament"); *see also Berger v. State of N.Y.*, 388 U.S. 41, 58 (1967) (noting that the use of general warrants "was a motivating factor behind the Declaration of Independence"); *Boyd v. United States*, 116 U.S. 616, 625 (1886) (describing the debate in which Otis's speech occurred as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country").

After the War for Independence was won, the colonists' fight to end the use of general warrants continued. Their use initially remained common in the new nation, CUDDIHY, THE FOURTH AMENDMENT, at 602 ("General warrants proliferated and remained the keystone of American laws and practices regarding search and

seizure until at least 1782."). But the "specific warrant ultimately won out." *Id.* By 1784, Vermont and half of the original thirteen states had "formulated constitutions with restrictions on search and seizure," although the precise formulations of those restrictions varied. *Id.* at 603; *see King*, 133 S. Ct. at 1980-81 (Scalia, J., dissenting) (quoting, for example, the Virginia Declaration of Rights § 10, which provided that "general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed," or to search a person "whose offence is not particularly described and supported by evidence," "are grievous and oppressive, and ought not be granted").[4]

When the Framers gathered to draft the new federal Constitution, concerns about potential abuses of governmental authority through the use of general warrants were raised. *See* Davies, 98 Mich. L. Rev. at 583. Indeed, the Constitution's failure to provide any protection against general warrants was a favorite topic of Anti-Federalist writers, at least 15 of whom penned objections to the Constitution on that ground. CUDDIHY, THE FOURTH AMENDMENT, at 674; *see id.* ("The general warrant attracted the earliest and heaviest criticism."); *King*, 133 S. Ct. at 1981 (Scalia, J.,

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[4] The introduction of constitutional prohibitions on the use of general warrants did not result in the complete elimination of such searches in the States, CUDDIHY, THE FOURTH AMENDMENT, at 624, 628, but these constitutional provisions were nonetheless the "direct ancestors" of the Fourth Amendment, *id.* at 603.

dissenting) ("Antifederalists sarcastically predicted that the general, suspicionless warrant would be among the Constitution's 'blessings'"). Patrick Henry, for example, "warned that the new Federal Constitution would expose the citizenry to searches and seizures 'in the most arbitrary manner, without any evidence or reason.'" *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting) (quoting 3 DEBATES ON THE FEDERAL CONSTITUTION 588 (J. Elliot 2d ed. 1854)). Another critic of the new Constitution described "the absence of security against [general] warrants as part of an 'extraordinary' failure by Congress to safeguard the people's rights." CUDDIHY, THE FOURTH AMENDMENT, at 674. James Otis's sister, Mercy Otis Warren, joined the fight, "assail[ing] writs of assistance" as "'a detestable instrument of arbitrary power.'" *Id.* at 677.

Several state ratifying conventions requested more explicit protection. The Fourteenth Amendment of Virginia's proposed Bill of Rights reflected Anti-Federalists' concerns about general warrants, providing, in pertinent part, that "all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted." *Id.* at 684. New York, North Carolina, and Rhode Island copied Virginia's search and seizure amendment with minimal alteration. *Id.* at 685. The arguments presented in favor of including an express prohibition on general warrants in the federal constitution received consistent and nationwide newspaper coverage, and "[t]he magnitude of that publicity indicated the

emergence of a consensus for a comprehensive right against unreasonable search and seizure." *Id.* at 686.

Although the Federalists initially believed that there was no need to add a Bill of Rights to the Constitution, by 1789, James Madison had decided the Constitution should be amended to expressly protect a number of "essential rights" not explicitly protected in the new Constitution, including the "security against general warrants." Letter from James Madison to George Eve (Jan. 2, 1789), *at* http://bit.ly/134r6nw. The initial text of Madison's proposed amendment made clear the importance that he attached to individualized and particularized suspicion as predicates for governmental searches: "The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be voided by warrants . . . not particularly descrybing the places to be searched, or the persons or things to be seized." 1 *Annals of Cong.* 452 (1789) (Joseph Gales ed., 1790). The language was subsequently modified in committee, but the requirement of specific warrants remained materially unchanged. CUDDIHY, THE FOURTH AMENDMENT, at 695-97.

The Fourth Amendment thus enshrines in our national charter the Framers' opposition to generalized searches that were not predicated on any individualized suspicion. As the next section demonstrates, warrantless cell phone searches like the ones that took places in the cases now before the Court violate that core Fourth Amendment

principle, even though those searches were incident to lawful arrests.

II. Permitting Broad Searches of Cell Phones Incident to Arrest Undermines the Fundamental Protections of the Fourth Amendment

As explained above, the Fourth Amendment was a response, in significant part, to the abusive use of general warrants by the British, but its adoption also reflected a broader concern about the intrusions into privacy that could result if the government enjoyed unlimited discretion to search people's homes and belongings. Michael, 85 N.Y.U. L. Rev. at 906 (noting the "broader purpose of the Amendment: to circumscribe government discretion"); CUDDIHY, THE FOURTH AMENDMENT, at 679 (noting an Anti-Federalist "desire to divest the central government not only of [the general warrant] but of all relatives of it that jeopardized privacy"). Thus, as this Court has repeatedly recognized, a core concern of the Fourth Amendment is ensuring that the government has individualized suspicion about wrongdoing before it intrudes on a person's privacy. *See, e.g.*, *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (explaining that the Fourth Amendment's "restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion"); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967) (explaining that the Fourth Amendment was "a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against

invasions of 'the sanctity of a man's home and the privacies of life' from searches under indiscriminate, general authority" (internal citation omitted)); *King*, 133 S. Ct. at 1982 (Scalia, J., dissenting) ("suspicionless searches are *never* allowed if their principal end is ordinary crime-solving").

Allowing the police to search the contents of an individual's cell phone without a warrant violates this fundamental Fourth Amendment precept because it permits exactly the sort of generalized search lacking in particularized suspicion (and the concomitant invasion of privacy) that the Fourth Amendment's requirement for particularized warrants was supposed to prevent. That such searches are triggered by an arrest does little to limit the government's discretion because arrests are often triggered by minor legal infractions; as Petitioner Riley notes, "in California as in most other states, the police may—and sometimes do—arrest people for traffic and other 'fine only' infractions such as jaywalking, littering, or riding a bicycle the wrong direction on a residential street." Riley Pet. Br. 2; *see* Wurie Pet. App. 19a (noting that the Government's proposed rule would allow cell phone searches "even for something as minor as a traffic violation").[5]

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[5] To the extent such searches disclose an individual's papers (as they often will), they are especially problematic in light of the Fourth Amendment's special protections for personal papers. *See supra* at 11 n.3; *see also* Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 101, 109 (2013) (discussing

Moreover, that the individual whose phone is being searched was arrested is not sufficient to justify such a broad invasion of privacy. As this Court recently noted, the fact that a person is in custody following arrest cannot justify all searches, regardless of the level of privacy invaded, *King*, 133 S. Ct. at 1979, and the traditional justifications for searches incident to arrest have no bearing once the cell phone has been removed from the arrestee's control, *see* Riley Pet. Br. 16-24; *see also Chimel v. California*, 395 U.S. 752, 763 (1969) (setting out the twin purposes of searches incident to arrest, *viz.*, "remov[ing] any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and "seiz[ing] any evidence on the arrestee's person in order to prevent its concealment or destruction"); *Arizona v. Gant*, 556 U.S. 332, 339 (2009) ("If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply."). Further, because of the vast stores of information that are generally saved on modern cell phones, the invasion of privacy inherent in such a search is significantly greater than the invasion involved in

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Learned Hand's "anti-rummaging" principle which held that "the police had no more constitutional power upon arrest than a judge issuing a warrant to comb through a vast trove of innocent papers in quest of an illegal one" and arguing that "[t]he anti-rummaging principle . . . suggests curtailing the warrantless seizure and search of digital devices incident to arrest").

previous search-incident-to-arrest cases, involving, for example, physical containers with much more limited and physical contents. *See* Riley Pet. Br. 3 ("Americans use smart phones to generate and store a vast array of their more sensitive thoughts, communications and expressive material."); *id.* at 14 ("[l]aw developed with only physical objects in mind cannot be woodenly applied to digital files containing virtually limitless amounts of information").

Modern cell phones are unique, after all, in that they permit individuals to carry significant amounts of personal information and documents that would previously have been kept in the home and office. Indeed, they are like computers in their ability to store vast amounts of information. *See, e.g.*, Bryan Andrew Stillwagon, Note, *Bringing an End to Warrantless Cell Phone Searches*, 42 Ga. L. Rev. 1165, 1172 (2008) (noting that cell phones have been described as "microcomputers"); *id.* at 1201 ("The more advanced devices are practically hand-held computers with telephone capabilities, giving the user access to a wealth of public and private data stored online and in the device's memory.").[6] Thus, they will often contain not only phone call records and a rolodex of the owner's

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[6] The storage capacities of modern cell phones are staggering. For example, "modern cell phones are capable of storing at least sixty-four gigabytes of private information equaling four million pages of Microsoft Word documents." Charles E. MacLean, *But, Your Honor, A Cell Phone Is Not a Cigarette Pack: An Immodest Call for a Return to the* Chimel *Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 Fed. Cts. L. Rev. 37, 42 (2012).

contacts (both professional and personal), but also thousands of email messages and texts, photographs, even personal notes. Petitioner Riley's smartphone was "capable of accessing the internet, capturing and storing photos and videos, providing and storing GPS location information, and capturing and storing both voice and text messages, among other features," Riley Pet. Br. 5, and the police search exposed private text messages, the phone's contacts list, photographs, and videos, *id.* at 5-6. Even Respondent Wurie's "comparatively unsophisticated flip phone" (Wurie BIO 12) contained, among other things, call logs and a rolodex of phone numbers. Wurie Pet. App. 3a.

In other words, many documents and effects that would once have been stored physically in a person's home are often now stored in digital form, and a search of a person's cell phone thus invites an invasion of personal privacy that is little different from the invasion of privacy produced by searches of people's homes and papers at the Founding. *See id.* at 18a-19a ("Just as customs officers in the early colonies could use writs of assistance to rummage through homes and warehouses, without any showing of probable cause linked to a particular place or item sought, the government's proposed rule would give law enforcement automatic access to 'a virtual warehouse' of an individual's 'most intimate communications and photographs without probable cause' if the individual is subject to a custodial arrest . . . ."); *cf. City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2630 (2010) ("Cell phone and text message communications are so pervasive that

some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.").

The Framers adopted the Fourth Amendment to ensure that the people would be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. This Court should hold that, absent exigent circumstances, the text and history of the Fourth Amendment do not permit police officers to conduct a warrantless search of the digital contents of an individual's cell phone seized from the person at the time of arrest.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to hold that, absent exigent circumstances, warrantless searches of the digital contents of cell phones incident to arrest violate the Fourth Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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DAVID LEON RILEY,
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v.

STATE OF CALIFORNIA,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

v.

BRIMA WURIE,
Respondent.

On Writs of Certiorari to the California Court of Appeal, Fourth District and the United States Court of Appeals for the First Circuit

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INTEREST OF *AMICI CURIAE*

Amici are criminal procedure professors who teach, study, and write about the Fourth Amendment.[1] *Amici* believe this case presents fundamental issues about how the Fourth Amendment will be interpreted in thousands of cases for decades to come. *Amici* are of the view that search incident to arrest precedent created in a non-digital world cannot be logically applied to cell phones and other mobile electronic devices.

The lead amicus, Adam M. Gershowitz, is a Professor of Law at William & Mary Law School. He has written numerous law review articles analyzing courts' approaches to searching cell phones incident to arrest, including: *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27 (2008); *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125 (2011); *Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577 (2012); *Seizing a Cell Phone Incident to Arrest: Data Extraction Devices, Faraday Bags, or Aluminum Foil as a Solution to the Warrantless Cell Phone Search Problem*, 22 WM. & MARY BILL RTS. J. 601 (2013).

A list of the other *Amici* who reviewed and join in this brief is included in the attached Appendix.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Court should not apply search incident to arrest precedent created in a world of typewriters and carbon paper to digital devices capable of storing a warehouse full of documents, pictures, and GPS location data. Cell phones carry a lesser risk of destruction of evidence and a greater risk of government intrusion on privacy than the limited technologies on which the search incident to arrest doctrine is based. Rather than allowing warrantless searches of cell phones incident to arrest, the Court should encourage law enforcement officers to place cell phones in Faraday envelopes or aluminum foil to prevent the remote wiping of data from the phone while officers seek a warrant.

A Faraday envelope is simply an aluminum-lined container that isolates its contents from outside signals. Law enforcement agencies can purchase Faraday envelopes for only a few dollars. In the alternative, at a cost of only pennies, police can prevent remote wiping by simply wrapping cell phones in a sheet of aluminum foil purchased from a grocery store. Because police departments would only have to equip a small fraction of officers with Faraday envelopes or aluminum foil, the cost would be minimal.

Forbidding warrantless cell phone *searches*, while allowing cell phone *seizures*, incident to arrest is preferable to applying the *Arizona* v. *Gant*, 556 U.S. 332 (2009) "reasonable to believe" formulation to cell phones. Because of the enormous amount of data held on cell phones, it would be reasonable for police to believe evidence of numerous minor crimes might be held on a cell phone. The *Gant* formulation

would therefore fail to offer meaningful privacy protection.

ARGUMENT

I. FARADAY BAGS PREVENT REMOTE CELL PHONE DATA WIPING, ARE INEXPENSIVE, AND ARE ALREADY WIDELY USED BY LAW ENFORCEMENT.

The Court should not apply search incident to arrest precedent created in a world of typewriters and carbon paper to digital devices capable of storing a warehouse full of documents, pictures, and GPS location data. The search incident to arrest doctrine enunciated in *Chimel* v. *California*, 395 U.S. 752 (1969) and *U.S.* v. *Robinson*, 414 U.S. 218 (1973) would fail to afford sufficient privacy protection to private data and would encourage police to unnecessarily rummage through, *inter alia*, reams of text messages, emails, internet browsing history, photographs, and GPS location datalocation information, and myriad other forms of data stored in cell phones. *See* Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 44 (2008).

The government interest in preventing destruction of evidence is inapplicable to cell phones because there is a simple solution that can protect private cell phone data while eliminating the risk of remote destruction of evidence: The Court should adopt a rule in which police officers who conduct a lawful arrest are permitted to seize cell phones without a warrant, and then protect evidence on the phones by placing them in a Faraday envelope or wrapping them in aluminum foil while applying for a search warrant.

Despite its unusual name, a Faraday envelope is a very simple and very common item. A "'Faraday bag' or 'Faraday cage' [is] essentially an aluminum-foil wrap or some equivalent, which isolates the cell phone from the phone network and from Bluetooth and wireless Internet signals." *U.S.* v. *Flores-Lopez*, 670 F.3d 803, 809 (7th Cir. 2012) (internal marks omitted). Faraday cages are omnipresent in American households. They are used in microwave ovens to keep the microwaves inside the oven and in coaxial cables to keep radiowaves from interfering with cable transmission. *See id.* (citation omitted). In laymen's terms, once a cell phone is placed inside of a Faraday bag or envelope, the phone can no longer communicate with the outside world and thus cannot be remotely wiped by a conspirator.

Numerous law enforcement agencies already use Faraday bags.[2] The United States Department of

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[2] *See U.S.* v. *Smith*, 715 F.3d 1110, 1114 (8th Cir. 2013) ("Special Agent Jackson [of the FBI office in St. Louis] then placed the four cell phones and the laptop in a 'Faraday' bag to prevent remote access so the phone could not be remotely wiped."); *U.S.* v. *Mayo*, No. 2:13-CR-48, 2013 WL 5945802, at *11 & n.9 (D. Vt. Nov. 6, 2013) (noting the practice of Vermont State Police to place cell phones in Faraday enclosures); Karl Dunnagan & Amber Schroader, *Dialing for Evidence*, 2 LAW OFFICER MAGAZINE 46, 49 (Jan./Feb. 2006), *available at* http://www.lawofficer.com/article/technology-and-communications/ dialing-evidence (explaining, in an article by a Los Angeles County Sheriff's deputy, that "[t]o remove a handset from the network, use a Faraday bag, such as Pareben's Wireless StrongHold bag"); Noah Shactman, *Fighting Crime with Cellphones' Clues*, N.Y. TIMES, May 3, 2006, http://www.nytimes.com/2006/05/03/technology/techspecial3/03cops.html?_r=0 (noting that "when Detective Reiber [of the Boise, Idaho Police Department] arrives on the scene, he places the phone in a 'Faraday bag,' a container made of triwoven

Justice and other law enforcement agencies have made Faraday bag use part of their policies and procedures.[3] And local law enforcement agencies have encouraged their use.[4] In addition to police

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copper, nickel, and silver that keeps the phone from making or receiving calls").

[3] *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, ELECTRONIC CRIME SCENE INVESTIGATION: A GUIDE FOR FIRST RESPONDERS 14 (2d ed. 2008), https://www.ncjrs.gov/pdffiles1/nij/219941.pdf ("First responders should also have radio frequency-shielding material such as faraday isolation bags or aluminum foil to wrap cell phones . . . . [to] prevent[] the phones from receiving a call, text message, or other communications signal that may alter the evidence."); *Legal Update Sept. 2013*, WEEKLY RAP UP (Monroe Cnty. Sherrif's Office, Stock Island, Fla.), Sept. 2013, at 1, https://www.keysso.net/employees/weekly_rap_up/2013/09132013.pdf ("When you seize a phone . . . you can ensure that "it cannot send or receive data . . . [by using] a 'faraday' bag."); Chenda Ngak, *LulzSec Takes on Arizona Law Enforcement*, CBS NEWS (Aug. 29, 2011, 3:18 PM), http://www.cbsnews.com/news/lulzsec-takes-on-arizona-law-enforcement/ (discussing internal Arizona memo instructing that "[l]aw enforcement seizing iPhones as potential evidence are recommended to protect the phone from wireless signals . . . through the use of a faraday bag").

[4] *E.g.*, Lt. John Bennett, *Don't Forget the Cell Phone*, CYBER FORENSICS DIV. NEWSLETTER (Armstrong Atl. State Univ. Police, Savannah, Ga.), July/Aug. 2013, at 3, http://www.armstrong.edu/images/police/cfdnewsletter.pdf ("You can disconnect the phone from the network by placing the phone in a Faraday device . . . . The phone can [also] be placed in a copper mesh bag, wrapped in aluminum foil (3-5 times), or simply sealed in a paint can. Keep a roll of aluminum foil in your vehicle for quick and easy access once the device is in possession."); Graham Kuzia, *Handling Cell Phones and Their Digital Evidence*, POLICE (Apr. 18, 2013), http://www.policemag.com/blog/technology/story/2013/04/cell-phone-seizures.aspx (noting in article by North Carolina police

officers and departments that have specifically acknowledged using Faraday bags, other agencies have recommended that approach.[5] Indeed, at least one state has promulgated a regulation encouraging the use of Faraday bags by law enforcement. W. VA. CODE ST. R. § 149-7-6.4.6.3.F.1(a) (instructing law enforcement officers that "[w]ireless mobile devices should be removed from the wireless networks . . . [by] removing the battery or placing the cellular telephone in a Faraday bag/container or wrap[ping] the device in three layers of aluminum foil . . . .").

Faraday bags come in a variety of forms ranging from moderately priced to very inexpensive. On the higher end, and selling for $58, are bags that are equipped with a clear window so that law enforcement can manipulate and examine the phone while protecting it from remote wiping.[6]

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officer that police should place cell phones in a "Faraday bag, aluminum foil, or signal-blocking container . . . . [to] prevent a third party from connecting to the phone and being able to alter what's on it").

[5] *See, e.g.*, VA. DEP'T OF FORENSIC SCIS., EVIDENCE HANDLING & LAB. CAPABILITIES GUIDE III-6 (Sept. 2012), http://www.dfs.virginia.gov/wp-content/uploads/2013/07/EvidenceGuide.pdf (recommending that cell phones be placed into a "shielded bag" such as the Faraday bag manufactured by Paraben Corporation); BUREAU OF FORENSIC SERVS., CAL. DEP'T OF JUSTICE, PHYSICAL EVIDENCE BULLETIN: DIGITAL EVIDENCE COLLECTION—MOBILE DEVICES 3 (Dec. 2011), http://oag.ca.gov/sites/all/files/pdfs/cci/reference/peb_18.pdf (recommending that mobile phones be placed "in a Faraday bag or similar material (e.g. arson cans, aluminum foil wraps, etc.)").

[6] *See, e.g.*, *Black Hole Faraday Bag—RF Signal Isolation for Forensics, Standard Window Size*, AMAZON, http://www.amazon.com/Black-Hole-Faraday-Bag-isolation/dp/

Police can purchase much cheaper Faraday envelopes—metallic-lined envelopes that have pre-printed chain-of-custody labels on the outside—for only $6.95 each, or at a lower price if purchased in bulk.[7] Even these simpler and cheaper Faraday envelopes can "dramatically reduce or completely eliminate any risk of remotely disturbing a cell phone's internal memory." Charles E. MacLean, *But, Your Honor, A Cell Phone is Not a Cigarette Pack: An Immodest Call for a Return to the* Chimel *Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 41, 54 (2012).

If police departments lack the funding for even the $6.95 Faraday envelope, they can have officers create their own Faraday envelopes for mere pennies by using aluminum foil sold in grocery stores. The essential ingredient in any Faraday device is the aluminum that blocks any signal from reaching the phone. Police need only a small amount of aluminum foil—a tiny fraction of an ordinary roll—to wrap the phone, immobilize it, and prevent the destruction of evidence. *See* Adam M. Gershowitz, *Seizing a Cell Phone Incident to Arrest: Data Extraction Devices, Faraday Bags, or Aluminum Foil as a Solution to the Warrantless Cell Phone Search*

B0091WILY0/ (last visited Mar. 4, 2014) (noting that the bag was "designed for law enforcement digital forensics").

[7] *See Paraben's Single-Use Stronghold Bags*, PARABEN, CORP., http://www.paraben.com/single-use-stronghold.html (last visited Mar. 4, 2014). The Faraday envelopes are manufactured by a company specializing in computer forensic software. *See About Paraben*, PARABEN, CORP., http://www.paraben.com/about.html (last visited Mar. 4, 2014).

Problem, 22 WM. & MARY BILL RTS. J. 601, 609 (2013). Given that Walmart sells 150 square feet of brand-name aluminum foil for less than $6, and given that about a foot of aluminum foil is sufficient to wrap a cell phone multiple times, the cost for police to create a Faraday enclosure using aluminum foil is about four cents.

Faraday bags, Faraday envelopes, or simple aluminum foil render the only rationale for the search incident to arrest doctrine that could possibly apply to cell phones inapplicable by preventing the destruction of evidence.[8] *See Chimel*, 395 U.S. at 763. Because Faraday devices or aluminum foil work effectively and cheaply, this Court should adopt a rule allowing only a seizure of the cell phone incident to arrest while the police apply for a search warrant.

II. FORBIDDING WARRANTLESS SEARCHES WHILE ALLOWING SEIZURES PROTECTS THE BALANCE OF INTERESTS BETWEEN THE GOVERNMENT AND CITIZENS.

A. Use of Faraday Envelopes or Aluminum Foil to Preserve Cell Phone Data Would Impose No Burden on Law Enforcement.

1. There is no practical limitation on law enforcement officers' ability to carry Faraday bags or foil to wrap cell phones, and the Court's precedents

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[8] The other rationale for the search incident to arrest doctrine—protecting officer safety—is not plausibly implicated in most cell phone searches. Moreover, to the extent a cell phone search would be necessary to protect against a danger to officers, the warrantless search could be justified under the general exigency exception. *See, e.g.*, *Warden* v. *Hayden*, 387 U.S. 294 (1967).

support allowing warrantless cell phone seizures to preserve evidence.

First, from a financial standpoint, Faraday devices are very inexpensive. Top-of-the-line Faraday bags that can also be used for forensic evaluation cost only $58. Simpler Faraday envelopes can be purchased for only $6.95. And a sheet of aluminum foil costs only pennies. *See supra* at pp. 7-8.

Second, there would be no logistical burden on most law enforcement officers. Having a few small Faraday envelopes or a few sheets of aluminum foil in a squad car is not a significant burden. Indeed, a square foot of aluminum foil is lightweight and can be folded small enough to fit easily into a pocket or glove compartment. Moreover, few law enforcement officers would need to carry the Faraday envelope or aluminum foil with them. Even though the DEA, FBI, and local police officers working in drug or gang units might need immediate access to Faraday envelopes or aluminum foil, the average officer on the street is unlikely to encounter a situation in which it is essential to immediately preserve cell phone data.[9] Thus, the Faraday envelopes and

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[9] A sizeable number of cell phone searches are conducted by a relatively small number of specialized law enforcement agencies. *See, e.g., U.S.* v. *Finley*, 477 F.3d 250 (5th Cir. 2007) (joint operation involving DEA); *U.S.* v. *Stephens*, No. 13-200004, 2013 WL 5409907 (W.D. Tenn. Sept. 25, 2013) (Organized Crime Unit of local police department); *U.S.* v. *Saldago*, No. 1:09-CR-454, 2010 WL 3062440 (N.D. Ga. June 12, 2010) (DEA agents); *U.S.* v. *LaSalle*, No. 07-00032, 2007 WL 1390820 (D. Haw. May 9, 2007) (DEA agent); *U.S.* v. *Brookes*, No. CRIM2004-0154, 2005 WL 1940124 (D. V.I. June 16, 2005) (DEA agents); *U.S.* v. *Cote*, No. 03CR271, 2005 WL 1323343 (N.D. Ill. May 26, 2005) (FBI agents); *U.S.* v. *Parada*, 289 F. Supp.2d 1291 (D. Kan., 2003) (DEA agents); *Wisconsin* v.

aluminum foil can be kept at the police station or in the officers' cruiser.

In its petition for certiorari in *U.S. v. Wurie*, the United States implicitly conceded that warrantless cell phone searches incident to arrest are a concern only in narcotics trafficking cases. Under the section heading, "The Question Presented Is Recurring And Important," the United States focused exclusively on the need for law enforcement officers to preserve evidence in complicated drug trafficking conspiracies. *See* Petition for Writ of Certiorari at *24-25, *U.S.* v. *Wurie*, No. 13-212 (Aug. 15, 2013), 2013 WL 4404658.

When specialized officers—such as DEA or FBI agents—conduct planned operations to interrupt a drug trafficking conspiracy, it makes sense that they carry Faraday envelopes or aluminum foil in their police cruisers so that they can prevent remote wiping by conspirators.

Most ordinary police officers on the street are not foiling complicated drug-trafficking operations. Ordinary police officers doing routine police work can bring cell phones to the police station where the phones can be placed in a Faraday envelopes or aluminum foil with no logistical difficulty.

Indeed, numerous cell phone search cases decided over the last five years demonstrate that it is already very common for police officers to bring cell phones to the station *prior to* searching them. *See, e.g., U.S. v. Wurie*, 728 F.3d 1, 2 (1st Cir. 2013) (explaining that phone was not searched until ten to

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Carroll, 778 N.W.2d 1 (Wis. 2010) (drug task force agent).

fifteen minutes after being taken to the police station).[10] Faraday envelopes and aluminum foil can thus be stored at the station, and the Seventh Circuit's concern that disallowing warrantless cell phone searches would place a "burden on the police of having to traipse about with Faraday bags" is misplaced. *See Flores-Lopez*, 670 F.3d at 810.

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[10] *See also U.S.* v. *Murphy*, 552 F.3d 405 (4th Cir. 2009) (seized cell phones were brought to Virginia State Police headquarters and later turned over to the DEA); *U.S.* v. *Gholston*, No. 13-20187, 2014 WL 279609 (E.D. Mich. Jan. 27, 2014) (FBI agent seized cell phone and then submitted an application for a warrant); *U.S.* v. *Dixon*, No. 1-12-CR-205, 2013 WL 4718934 (N.D. Ga. Sept. 3, 2013) (ATF agent searched phone at office); *U.S.* v. *Nyuon*, No. CR.12-40017-01, 2013 WL 943635 (D.S.D. Mar. 11, 2013) (drug task force officer searched cell phone at station); *U.S.* v. *Dimarco*, No. 12CR205, 2013 WL 444764 (S.D.N.Y. Feb. 5, 2013) (search of cell phone at station six hours after arrest); *U.S.* v. *Wall*, No. 08-60016, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008) (DEA agents searched cell phone at station); *U.S.* v. *Rocha*, No. 06-40057-01, 2008 WL 4498950 (D. Kan. Oct. 2, 2008) (search by DEA task force agent at station); *U.S.* v. *James*, No. 1:06CR134, 2008 WL 1925032 (E.D. Mo. Apr. 29, 2008) (search "several days after the cell phone was seized" under the automobile exception); *U.S.* v. *Park*, No. CR05-375, 2007 WL 1521573 (N.D. Cal. May 23, 2007) (phones were taken to police station and "placed into envelopes for safe keeping"); *California* v. *Diaz*, 244 P.3d 501 (Cal. 2011) (search of cell phone 90 minutes after arrestee brought to police station); *Connecticut* v. *Boyd*, 992 A.2d 1071 (Conn. 2010) (search of cell phone "[l]ater that night" at the police station); *Ohio* v. *Smith*, 920 N.E.2d 949 (Ohio 2009) (explaining that search of cell phone likely occurred at police station); *Gracie* v. *Alabama*, 92 So.3d 806 (Ala. Crim. App. 2011) (search of cell phone at station); *Oregon* v. *Nix*, 237 P.3d 842 (Or. Ct. App. 2009) (cell phone transported to police station so that it could be analyzed by an agent specially trained in cell phones).

Finally, if an officer is not near the police station, she can request backup from another police officer who has a Faraday envelope or aluminum foil in his patrol car. *See, e.g.*, *U.S.* v. *Curry*, No. 07-100, 2008 WL 219966, at *2-3 (D. Me. Jan. 23, 2008) (explaining how DEA agent seized cell phones until another officer brought an evidence storage bag to the scene).

In sum, even though it might be wise for specialized groups of law enforcement agents—such as DEA and FBI agents—to be equipped with Faraday envelopes or aluminum foil, the vast majority of police officers would not have to carry either item. The cost and logistical difficulty of Faraday envelopes or aluminum foil is therefore minimal.

2. There is ample precedent to support a rule that police can seize cell phones and place them in Faraday envelopes, but not conduct searches of the devices without a warrant. In at least three contexts—seizure of individuals, seizure of evidence, and searches of automobiles—the Court has encouraged police to conduct warrantless seizures in order to prevent destruction of evidence so that officers can obtain a warrant before searching.

Seizure of Individuals: The Court has encouraged law enforcement to immobilize individuals who might destroy evidence inside of a home while the officers apply for a warrant. In *Illinois* v. *MacArthur*, 531 U.S. 326 (2001), the Court approved the warrantless seizure of an individual to prevent him from entering his home and destroying evidence while the police waited for a magistrate to issue a warrant.

There, police had probable cause to believe MacArthur had marijuana in his house, but they lacked a warrant to enter. *See id.* at 328. Rather than entering and searching without a warrant, the officers restricted MacArthur's movements and prevented him from entering the residence unsupervised for a period of two hours while they applied for a warrant. *See id.* at 329. MacArthur moved to suppress the marijuana and related contraband on the ground that the police had seized him unlawfully. *See id.* The Court rejected MacArthur's challenge to the seizure, concluding that the police acted reasonably by taking a far less invasive action than a warrantless search. *See also Segura* v. *U.S.*, 468 U.S. 796 (1984) (despite splitting on legality of a search, the majority and minority both recognized that it would have been far less invasive for police to seal the residence from the outside without a warrant, than to search without a warrant).

Seizure of Evidence: The Court has likewise approved of warrantless seizure of tangible items while the police procure a warrant to search them. In *U.S.* v. *Place*, 462 U.S. 696 (1983), police had reasonable suspicion that a traveler who had just landed at LaGuardia Airport had drugs in his suitcases. When Place refused to consent to a search of the luggage, officers seized the suitcases and took them across town to Kennedy Airport where a drug-sniffing dog alerted that drugs were in at least one of the suitcases. Place moved to suppress on the grounds that the police could not seize his luggage without a warrant. Although the Court ultimately concluded that the detention of the luggage was too lengthy to comply with *Terry* v. *Ohio*, 392 U.S. 1

(1968),[11] the Court recognized that it was permissible for police to seize the luggage to pursue further investigation but not search it without a warrant. Once again, the Court recognized that there are varying levels of intrusiveness and that a seizure of items such as luggage is less invasive than warrantless searching. *See id.* at 705-06. *See also U.S.* v. *Chadwick*, 433 U.S. 1, 15 n.8 (1977) (finding warrantless search of a footlocker unconstitutional, and noting that "[a] search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker").

Containers in Automobiles: For a short time, the Court required police with probable cause for a specific container in an automobile to seize the container, but not search it without a warrant. Even though the Court ultimately abandoned this rule, it did so because of peculiarities in the automobile context that would not be present with respect to cell phones.

In *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), officers had probable cause to believe that a suitcase placed in the trunk of a taxi contained marijuana. The police thus had probable cause for a container in a vehicle, but not the vehicle itself. The Court refused to uphold a warrantless search of the suitcase, concluding that the police should have seized the suitcase without a warrant but procured a search warrant before opening it. The Court focused

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[11] The duration problem would not be present in the cell phone context because the searches would be incident to arrest, rather than under the more limited *Terry* doctrine at issue in *Place*.

on the privacy associated with luggage and explained that "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Id.* at 762.

The Court ultimately overruled *Sanders* in *California* v. *Acevedo*, 500 U.S. 565 (1991) for two reasons. First, requiring containers to be seized but not searched without a warrant was too confusing for police who had to make quick decisions in the automobile context. *See Acevedo*, 500 U.S. at 576. The rule in *Sanders*—that police had to obtain a warrant when they had probable cause solely for a container that happened to be in a vehicle—caused confusion given that the automobile exception allows police to search anything in a vehicle when they have probable cause for the vehicle itself. *See U.S.* v. *Ross*, 456 U.S. 798 (1981). Second, this confusion came with negligible benefit because, as the Court recognized in *Sanders* and reiterated in *Acevedo*, "Since the police . . . have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming. . . ." *Acevedo*, 500 U.S. at 575 (quoting *Sanders*, 442 U.S. at 70). In short, the rule that police had to seize, but not search a container in a vehicle, was difficult to apply with respect to automobiles and added little privacy protection.[12]

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[12] Notably, the *Acevedo* Court did not disturb the rule that outside of the automobile context police could seize a container but would not be permitted to search it without a warrant. *See* Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1441 (2010).

Neither of these problems would be present in the cell phone context. First, a rule that police can seize a cell phone incident to arrest but not search the phone without a warrant is perfectly clear. Following a lawful arrest, officers will know that they may seize a cell phone and place it in a Faraday envelope, but that they cannot search it without a warrant. There is no room for ambiguity.

Second, unlike in *Sanders*, a bright-line rule allowing warrantless seizures—but not searches—of cell phones incident to arrest would be very protective of privacy. When police seize a cell phone following an arrest, a warrant will not "be routinely forthcoming." *Acevedo*, 500 U.S. at 575 (quoting *Sanders*, 442 U.S. at 70). Even though there may be probable cause for an arrest, that would not usually mean there would be probable cause to believe an arrestee's cell phone contains evidence of a crime. Additionally, even if there were probable cause that some application on the phone might contain evidence, a magistrate could conclude that there is only probable cause for particular applications on the phone—for instance, the text messages—and therefore authorize a search only of that application. *See* Gershowitz, *Seizing a Cell Phone Incident to Arrest*, *supra*, at 611 (noting that magistrates are free to issue warrants that limit which applications and functions police can search). Requiring police to procure a warrant will therefore limit the search to locations on the phone where evidence is likely to be, rather than allowing general rummaging through text messages, email, photos, internet browsing history, and other private data that also happens to be on the phone.

B. The Court Should Not Apply *Arizona* v. *Gant*'s "Reasonable To Believe" Stand-ard To Cell Phones.

This Court should reject the conclusion of a few lower courts and scholars that the *Arizona* v. *Gant*, 556 U.S. 332, 343 (2009), "reasonable to believe" formulation should be applied to cell phone searches incident to arrest because it would allow widespread warrantless searches following arrests for minor offenses. The *Gant* standard would not impose a meaningful limitation on law enforcement because it could be reasonable for police to believe evidence of numerous minor offenses might be found on the phone.

In *Gant*, the Court narrowed *New York* v. *Belton*, 453 U.S. 454 (1981) by permitting searches of vehicles incident to arrest only when the arrestee is unsecured or when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 556 U.S. at 343 (quoting *U.S.* v. *Thornton*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

In narrowing the search incident to arrest doctrine, the *Gant* Court recognized the need to prevent wide-ranging searches following arrests for minor offenses. The Court explained that there was a widespread privacy risk in allowing container searches:

> [S]earches [under the old rule in *Belton*] authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is

> caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

Id. at 345.

A few courts and scholars have maintained that applying the *Gant* "reasonable to believe" formulation to cell phone searches would protect against invasive searches following arrests for minor offenses. *See, e.g.*, *U.S.* v. *McGhee*, No. 8:09CR31, 2009 WL 2424104, at *3 (D. Neb. July 21, 2009); Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 406-07 (2013). This is not correct.

Because of the enormous quantity and wide variety of information held in cell phones, it could be reasonable for police to believe evidence of many minor crimes might be found on cell phones. Applying the *Gant* standard to cell phone searches incident to arrest would thus fail to achieve the goal of preventing police officers from having "unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345.

A few low-level offenses are illustrative.

Drunk Driving: Driving while intoxicated is one of the most common criminal offenses committed in

the United States, with nearly 1.5 million arrests annually.[13] Many cell phones now have applications that enable users to pay their bills by using their phones.[14] One application—Google Wallet—is now accepted as a method of payment in "hundreds of thousands of merchant locations in the United States."[15]

Because Google Wallet and other cell phone applications can hold a receipt documenting the location where alcohol was consumed, the time a bar tab was paid, and the specific alcoholic drinks purchased, it is "reasonable to believe" evidence of the crime of drunk driving might be found on the phone.

Additionally, given the frequency with which people photograph themselves in social situations, it could also be reasonable for police to believe photographic evidence of a night of drinking might be found in the photo library of a cell phone. The *Gant* formulation would thus permit searches incident to arrest of photo galleries and any applications that my contain photos, such as Twitter, Facebook, and Instagram following a drunk driving arrest.

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[13] *See* CRIMINAL JUSTICE INFO. SERVS. DIV., U.S. DEP'T OF JUSTICE, TABLE 29: ESTIMATED NUMBER OF ARRESTS (2009), http://www2.fbi.gov/ucr/cius2009/data/table_29.html.

[14] *See* Laurie Segall, *5 Pay-By-Phone Apps Tested*, CNNMONEY (Sept. 24, 2012, 9:31 AM), http://money.cnn.com/gallery/technology/2012/09/24/mobile-payment-apps/index.html.

[15] *See Frequently Asked Questions*, GOOGLE WALLET, http://www.google.com/wallet/faq.html (last visited Mar. 4, 2014).

Texting While Driving: Many jurisdictions criminalize texting while driving or other types of distracted driving, such as operating a vehicle while "[m]anually entering multiple letters or text in the device as a means of communicating with another person." N.C. GEN. STAT. ANN. § 20-137.4A; *see* Adam M. Gershowitz, *Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577 (2012) (summarizing all state statutes). And even though most jurisdictions punish texting while driving and other distracted driving with only a small fine, minor traffic offenses are arrestable offenses in many jurisdictions. *See* Janet Koven Levit, *Pretextual Traffic Stops:* United States *v.* Whren *and the Death of* Terry *v.* Ohio, 28 LOY. U. CHI. L.J. 145, 152 nn.63-64 (1996) (minor traffic offenses are arrestable offenses in many jurisdictions). As such, police in many states are authorized to conduct a search incident to arrest following an arrest for texting while driving. *See Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001).

If an officer arrests an individual for texting while driving, it would obviously be reasonable for the officer to believe evidence of the texting might be found on the driver's cell phone. But the officer would not be limited to reviewing text messages. In states that forbid "manually entering multiple letters or text in the device as a means of communicating" while driving, *e.g.*, N.C. GEN. STAT. ANN. § 20-137.4A, it would be reasonable for the officer to search, at minimum, any text messages, email messages, internet browsing history, Facebook accounts, or other social media applications on the phone for

evidence that the phone was in use while driving. Under the *Gant* rationale, officers would therefore be justified in conducting wide-ranging searches of cell phones for low-level traffic offenses that carry only a small fine. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 90, § 13B (punishing texting while driving with a $100 fine); N.J. STAT. ANN. § 39:4-97.3 ($100 fine); N.C. GEN. STAT. ANN. § 29-137.4A ($100 fine); R.I. GEN. LAWS § 31-22-30 ($85 fine); TENN. CODE ANN. § 55-8-199 (fine of no more than $50); WYO. STAT. ANN. § 346.89 (up to $75 fine).

Low Level Drug Possession: The *Gant* formulation could also permit police to search cell phones incident to arrest following arrests for possession of a small amounts of drugs, such as marijuana.

Drug purchases are often coordinated by text message. *See, e.g.*, *U.S.* v. *Aguirre*, 664 F.3d 606, 615 (5th Cir. 2011) (noting testimony of FBI agent that cell phones record evidence of the "buying and selling of drugs"); *U.S.* v. *Finley*, 477 F.3d 250, 254 n.2 (5th Cir. 2007) (describing incriminating text messages in search incident to arrest of cell phone). Because law enforcement is aware that texting is a way to conduct drug transactions, officers are trained to search cell phones in drug arrests. *See U.S.* v. *Wall*, No. 08-60016-CR, 2008 WL 5381412, at *4 (S.D. Fla. Dec. 22, 2008) (quoting testimony of drug enforcement agent that "it is his practice to search cell phones for text messages primarily because DEA's policy allows for it and because it is common to find text messages that further the investigation").

An officer who arrests a suspect for possession of a small amount of marijuana may reasonably believe

the purchase was coordinated by text message or other social media communication, thus authorizing a search of the phone under the *Gant* formulation. An arrest for a small amount of marijuana could therefore permit a wide-ranging search of the phone's text messages, emails, or Facebook messages.

Because police conduct thousands of arrests for minor narcotics possession each year,[16] the *Gant* formulation would authorize police to search cell phones incident to arrest following an enormous number of low-level drug possession arrests.

Any offense in which location data proves guilt: Perhaps most significantly, applying the *Gant* standard to cell phone searches incident to arrest would authorize police to search cell phones incident to arrest for any crime where a suspect's location could help to prove his guilt.

Cell phones contain an enormous amount of location data that can link an individual to minor criminal activity. Some cell phones contain a history function that documents every location where the phone has been for multiple weeks.

On iPhones with new operating systems, a police officer simply has to tap the "Settings" icon, then "Privacy," followed by "Location Services," then "System Services," and finally "Frequent Locations." The iPhone will then show the addresses where the phone has been over the last few weeks. And if the

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16 *See, e.g.*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERV., ADULT ARRESTS: 2003-2012, http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/Allcounties.pdf (noting 62,115 to 83,758 misdemeanor drug arrests annually in New York City alone).

officer taps on a particular address, the iPhone will specify the exact dates and times when the phone was present at that location. *See* Dwight Silverman, *Your iPhone Knows Where You've Been, Puts It on a Map*, SEATTLE POST-INTELLIGENCER, Oct. 31, 2013, http://blog.chron.com/techblog/2013/10/your-iphone-knows-where-youve-been-puts-it-on-a-map/.

Older phones and less sophisticated models also contain functions or applications that include location data. The map function on many cell phones can provide law enforcement with the specific addresses where an individual has recently traveled. The Foursquare check-in application can automatically record when a phone has been near a specific business.[17]

In light of the vast location data stored on cell phones, it is reasonable for law enforcement to believe evidence of many minor crimes might be found on the phone. For example, following a prostitution arrest, officers might reasonably believe the cell phone could link the arrestee to an incriminating address. In an arrest for petty theft, the phone might show that the arrestee was at the store when the theft occurred. In an arrest for public intoxication or underage drinking, the phone might prove presence at a bar or on a public street.

In all of these examples—driving while intoxicated, texting while driving, minor drug possession, prostitution, petty theft, public intoxication, and underage drinking—the phones

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[17] *See* MG Siegler, *Check-in on Foursquare Without Taking Your Phone Out of Your Pocket*, TECHCRUNCH, Aug. 2, 2010, http://techcrunch.com/2010/08/02/future-checkin/.

might contain evidence that links individuals to criminal activity. The problem is not this incriminating evidence. The problem is the reams of unrelated private information—voicemail and text messages from spouses or lovers, health records, embarrassing photographs, business documents, and future travel plans—that law enforcement officers will be able to review after arresting an individual for a minor crime. *See* Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 41-44 (2008) (detailing the sensitive and embarrassing information an officer can come across during a search incident to arrest of a cell phone).

Moreover, allowing searches of cell phones under the *Gant* formulation would invite abuse. It is not far-fetched to imagine a police officer, after pulling someone over and arresting him for texting while driving, to suspect that he may have committed other crimes based on his look, the location, or even the time of day. The officer could then arrest the suspect for texting while driving and rummage through any text messaging application looking for evidence of other crimes the officer has a hunch the driver may have committed.

As technology advances, the list of minor offenses that could give rise to an invasive cell phone search under the *Gant* formulation will almost certainly grow. As time and technology move forward, the *Gant* formulation will therefore provide less and less protection against general police rummaging of cell phones. Accordingly, the Court should reject the *Gant* formulation in specifying the scope of a search incident to arrest of cell phones.

* * *

A bright-line rule permitting seizures, but not searches, of cell phones incident to arrest would in no way injure law enforcement's ability to preserve evidence. Should law enforcement choose to use a Faraday envelope or aluminum foil, that approach would be both workable for the police and protective of the reams of private data stored on or accessible from cell phones. And as the Court explained in *Segura*, "a seizure affects only possessory interests, not privacy interests. Therefore, the heightened protection we accord privacy interests is simply not implicated where a seizure of premises, not a search, is at issue." 468 U.S. at 810. Thus, the rule finds the right balance between protecting the government's evidence preservation interest and the citizen's privacy interest.

CONCLUSION

For these reasons, the judgment below should be reversed in *Riley* and affirmed in *Wurie*.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-212

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

BRIMA WURIE, *Respondent*.

On Writ of Certiorari to the
U.S. Court of Appeals for the First Circuit

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Inc., U.S. Justice Foundation, National Association for Gun Rights Inc., Center for Media and Democracy, Lincoln Institute for Research and Education, Western Journalism Center, Free Speech Coalition, Free Speech Defense and Education Fund, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Respondent

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INTEREST OF *AMICI CURIAE*[1]

Downsize DC Foundation, Gun Owners Foundation, U.S. Justice Foundation, Center for Media and Democracy, Lincoln Institute for Research and Education, Western Journalism Center, Free Speech Defense and Education Fund, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). DownsizeDC.org, Gun Owners of America, Inc., National Association for Gun Rights Inc., Free Speech Coalition, and Abraham Lincoln Foundation for Public Policy Research are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, including programs to conduct research and to inform and educate the public on important issues of national concern, the proper construction of state and federal constitutions and statutes, questions related to human and civil rights secured by law, and related issues. Each organization has filed a number of *amicus curiae* briefs in this Court and other federal courts. With respect to the Fourth Amendment, many of these *amici* filed an

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae brief in this Court at the petition stage as well as an *amicus curiae* brief on the merits in United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012).

SUMMARY OF ARGUMENT

At issue in United States v. Wurie and its companion case, Riley v. California, is whether the Court will continue to apply its evolving reasonable expectation of privacy test birthed in Katz v. United States to searches incident to arrest, or instead continue with its restoration of property principles begun in United States v. Jones and Florida v. Jardines.

In both Jones and Jardines, this Court ruled that the Fourth Amendment was undergirded primarily by the common law of private property, and only secondarily upon privacy. The Court held that in no case can the absence of a reasonable expectation of privacy undermine a person's property rights against unreasonable searches and seizures. Remarkably, all parties in both Wurie and Riley have urged this Court to resolve the question — whether a warrantless search of a cell phone found on an arrestee is reasonable — solely on the basis of privacy interests, without any regard for the arrestee's private property interests in his person, papers, and effects.

Amici urge this Court instead to resolve the reasonableness of cell phone searches according to the property principles stated in Jones and Jardines. This Court's decisions based upon the Katz "reasonable

expectation of privacy" test have eroded rather than secured the rights originally protected by the Fourth Amendment. Since its first use nearly five decades ago, the privacy test has devolved into a subjective balancing of interests, whereby courts weigh individual privacy interests on the one hand against government interests on the other. Not surprisingly, this weighing of the interests has produced a checkerboard of unprincipled results.

Indeed, the reasonableness of a search incident to arrest should be based on the government's superior property interest in the person of the arrestee, but that property interest does not also extend to that person's house, papers, or effects. While the arrestee may be separated from certain limited items that he may have on his person, any further search into the contents of his papers and effects must be based upon compliance with the warrant, probable cause, and particularity requirements of the Fourth Amendment.

In both Wurie and Riley, once the government fulfilled its purpose of arrest by removing the cell phones from the arrestees, it became no more than a bailee of personal property, subject to the Fourth Amendment's warrant, probable cause, and particularity protections. Instead of honoring those limitations, the government exceeded its authority as a bailee, unconstitutionally trespassing on the exclusive right of the arrestee to be secure in his papers and effects.

ARGUMENT

I. THIS CASE WAS LITIGATED BELOW EXCLUSIVELY ON THE KATZ REASONABLE EXPECTATION OF PRIVACY TEST.

On the surface, it appears that United States v. Wurie and its companion case, Riley v. California, present a single straight-forward question — whether the search-incident-to-arrest doctrine permits a cell phone seized from an arrestee to be the subject of a warrantless search. A closer examination, however, reveals that the very foundation of the search-incident-to-arrest doctrine is at issue.

In Wurie, the government argues for an almost limitless doctrine, that "an arresting officer may seize and search any items found on an arrestee's person, including closed containers." Petition for a Writ of Certiorari ("Pet.") at 4. The court of appeals below concluded just the opposite, "adopt[ing] a 'bright-line rule' that the ... police [are] never permit[ted] to search the contents of a cell phone found on the person of an arrestee without first obtaining a warrant." *See* United States v. Wurie, 728 F.3d 1, 11 (1st Cir. 2013).

According to the government's reading of applicable precedents, a search incident to arrest, originally designed for "preserving destructible evidence and protecting officer safety," now need not be justified on either, because of "an arrestee's diminished expectation of privacy...." Pet. at 11, 13, 15. However, according to the court of appeals, preserving evidence and protecting officer safety must be "[w]eighed

against the significant privacy implications inherent in cell phone data searches...." Wurie, 728 F.3d at 11, 12.[2]

The government and the court of appeals rely upon the exact same Supreme Court precedents, yet reach diametrically opposite conclusions. Of course, such results can easily be obtained when the test being applied is based not on the fixed constitutional text, history, and tradition, but on a subjective balancing of a person's "reasonable expectation of privacy."[3] Under this approach, the Court considers whatever factors may appear to be persuasive and decides whether to exempt the government from the warrant, probable cause, and particularity requirements of the Fourth Amendment.[4]

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[2] The circuit court based its decision on the fact that "'a modern cell phone is ... not just another purse or address book.'" *Id.* at 8. The circuit court explained that the privacy interest in one's cell phone is far greater than his other belongings, since:

- "The storage capacity of today's cell phones is immense."
- The "information [contained by a phone] is, by and large, of a highly personal nature...."
- "It is the kind of information one would previously have stored in one's home...."
- "'At the touch of a button a cell phone search becomes a house search....'" *Id.* at ___.

Thus, for the circuit court, Wurie's privacy interests in his cell phones outweighed the government's interests in conducting a search incident to a lawful arrest.

[3] *See* Brief for the United States, p. 13. *See also* Brief of Respondent, pp. 9-12.

[4] In his autobiography, Justice William O. Douglas recounted a statement that Chief Justice Charles Evans Hughs made to him

Similarly, the petitioner in Riley, like Wurie, has contended that "[s]earching the digital contents of a smart phone furthers neither of the [historically recognized] governmental interests ... and impinges upon personal privacy to an unprecedented degree." Brief for Petitioners, p. 10 in Riley v. California (No. 13-132). In opposition to Riley's petition for certiorari, the California authorities contended otherwise, relying heavily on People v. Diaz, 244 P.3d 501 (Cal. 2011). In Diaz, the Supreme Court of California, like the federal government in Wurie, ruled that an arrestee has "'reduced expectations of privacy caused by the arrest.'" *Id.* at 506. Indeed the California Supreme Court concluded that "the lawful custodial arrest justifies the infringement of **any** privacy interest the arrestee may have." *Id.* at 507 (emphasis added).

Thus, while the contending parties in these two cases reach opposite conclusions as to the application of the search-incident-to-arrest doctrine to cell phones, all parties assume that the Fourth Amendment test is whether the arrestee has a "reasonable expectation of privacy" in his cell phone.[5]

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about how the Court operates: "Justice Douglas, you must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." William O. Douglas, The Court Years, p. 8 (Random House 1980).

[5] *See* Brief for the United States at 9-11, 13-28 and Brief for Respondent Wurie at 9-13 (No. 13-212), and Brief for Petitioner Riley at 13-16 and Brief for Respondent State of California at 7-11, 22, 25-28, 41-58 (No. 13-132).

These *amici* take the position that none of the parties has addressed the central constitutional issue, a deficiency which may require the Court to order re-briefing. "Privacy" is not a term mentioned in the Constitution, and the judicially created test of whether a person has a "reasonable expectation of privacy" should not be allowed to displace the text of the Constitution, which certainly restricts physical searches. The correct constitutional test is grounded in the plain language of the Fourth Amendment. Because the Court's expectation-based test is faulty, the search-incident-to-arrest doctrine which has been built upon it cannot be trusted to reach proper conclusions. That approach is both extra-constitutional and has proven insufficient to secure the rights the Founders expressly insisted be protected by the Fourth Amendment.

II. "SEARCHES INCIDENT TO ARREST" MUST BE ANALYZED USING PROPERTY PRINCIPLES EMBODIED IN THE FOURTH AMENDMENT.

A. Court Decisions Based on Reasonable Expectations of Privacy Have Eroded Fourth Amendment Rights.

For many years, the scope of a search incident to arrest was narrow, permissible only in order to effectuate narrow and specific purposes.[6] As late as

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[6] *See, e.g.*, Agnello v. United States, 269 U.S. 20, 30 (1925) ("The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search

1968, the Court described a search upon arrest for (i) weapons and (ii) implements of escape as "reasonably **limited in scope** by these purposes," noting with approval that the police officer "did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects." Sibron v. New York, 392 U.S. 40, 67 (1968).

However, the year before Sibron was decided, this Court had already begun to abandon the Fourth Amendment's foundational property principles upon which the search incident to arrest doctrine originally was based. Beginning in Warden v. Hayden, 387 U.S. 294 (1967), and Katz v. United States, 389 U.S. 347 (1967), the Court embraced a newly created right to privacy.[7]

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the place where the arrest is made in order to find and seize things connected with the crime as its [i] **fruits** or as [ii] the **means** by which it was committed, as well as [iii] **weapons** and other [iv] **things to effect an escape** from custody, is not to be doubted." (Emphasis added).)

[7] Such a modification of Fourth Amendment jurisprudence might have been thought necessary after the Court's refusal in Olmstead v. United States, 277 U.S. 438 (1928), to protect a person's electrical communications over telephone lines, based on a cramped view of what constitutes "property" under the Fourth Amendment. Following the logic of the Olmstead decision, a trespass occurs where government agents enter a man's home and break into his desk to read his letters without a warrant, but no trespass occurs when the government agents access his computer from outside his home to read the exact same correspondence in electronic form.

In District of Columbia v. Heller, 564, U.S. 570 (2008), Justice Scalia had no trouble applying constitutional protections to changing technology. He wrote that "[s]ome have made the

In justification of this new, modern privacy-based view of the Fourth Amendment, the Court stated that "[t]he premise that **property** interests control the right of the government to search and seize **has been discredited** ... the principal object of the Fourth Amendment is the protection of privacy rather than property, and [we] have increasingly discarded fictional and procedural barriers rested on property concepts." Warden v. Hayden, 387 U.S. at 304 (emphasis added).

This newly created right to privacy took little time to percolate into the search-incident-to-arrest doctrine. As the court of appeals explained, "the modern search-incident-to-arrest doctrine emerged from Chimel v. California, 395 U.S. 752 (1969)...." Wurie, 728 F.3d at 3. Justice Stewart, writing for the majority in Chimel, noted that the Court's jurisprudence in this area had been a "sw[inging] pendulum," and thus "hardly ... an unimpeachable line of authority."[8] *Id.*, 395 U.S. at

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argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications ... and the Fourth Amendment applies to modern forms of search ... the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582.

Olmstead was wrongly decided, and seems to have contributed to the jettisoning of property in favor of privacy.

[8] Justice White agreed, writing in dissent that "[f]ew areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search 'incident to an arrest.'" *Id.* at 770.

758, 760. In Chimel, however, the Court recognized a fundamental distinction between a search of the arrested **person** and a search of the **place** where the person was arrested, limiting the search to the person. *See* Chimel, 395 U.S. at 754.

The Court in Chimel noted that, although previous cases had upheld searches of the **person**[9] and searches of certain **effects**,[10] those cases "made no reference to any right to search the ***place*** where an arrest occurs." *Id.* at 755 (emphasis added). The Court favorably quoted Judge Learned Hand's analogy that "'[a]fter arresting a man in his house, to rummage at will among his **papers** in search of whatever will convict him, appears to us to be indistinguishable from ... a general warrant.'" *Id.* at 767 (emphasis added).

However, in United States v. Robinson, 414 U.S. 218 (1973), the Court moved in a decidedly different direction from the more restrictive approach that it took in Sibron. The Court rejected language in Sibron as having imposed "a novel and far-reaching limitation on ... the traditional and unqualified authority of the arresting officer to search the arrestee's person." *Id.* at 229. In order to unlink itself from Fourth Amendment property principles, the Robinson Court alleged that the common-law authorities on "search incident to arrest ... are sparse" — an assessment that dissenting Justice Marshall called "disingenuous." Freed from any guiding principles, the Court opted for a "**broad**

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[9] United States v. Weeks, 232 U.S. 383 (1914).

[10] Carroll v. United States, 267 U.S. 132 (1925).

statement of the authority to search incident to arrest," somehow ostensibly reconciling that with Sibron's "**limited**" search.[11]

In an effort to explain the majority opinion and to chart a future course, Justice Powell wrote a concurrence. Eschewing the Fourth Amendment's itemization of "persons, houses, papers, and effects," Justice Powell lumped them all under a new banner: "areas of an individual's life about which he entertains legitimate expectations of privacy." Robinson, 414 U.S. at 237 (Powell, J., concurring). He asserted that an unlimited search incident to arrest was justified "because the **privacy** interest protected by that **constitutional guarantee** is legitimately **abated** by the fact of arrest." *Id.* at 237-38. Justice Powell argued that "an individual [once arrested] retains no significant Fourth Amendment interest in the privacy of his person." *Id.* According to Justice Powell, the search-incident-to-arrest doctrine called for a balancing of the interests between individual privacy and the government's law enforcement interests, where the government's interests would almost always prevail:

> If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is **subordinated** to a legitimate and overriding governmental concern. No reason then exists to frustrate law enforcement by requiring

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[11] *Compare* Robinson, 414 U.S. at 232-33 (emphasis added) with Sibron, 392 U.S. at 67.

> some independent justification.... This seems to me the reason that a valid arrest justifies a full search of the person, **even if that search is not narrowly limited by the twin rationales** of seizing evidence and disarming the arrestee. [*Id.*, 414 U.S. at 237 (emphasis added).]

Four years after Robinson, in United States v. Chadwick, 433 U.S. 1 (1977), a unanimous Court adopted Justice Powell's privacy reasoning in a search of a footlocker pursuant to arrest.[12] Citing Katz, the Court stated that "the Fourth Amendment 'protects people, not places[,]' more particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy." Chadwick, 433 U.S. at 7.

The Katz privacy doctrine has led to absurd results, which permit governmental acts of criminal trespass,[13] facilitate and sanction breaches of contract,[14] and even

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[12] Both dissenting opinions also rested upon privacy considerations. *See* Chadwick, 433 U.S. at 20.

[13] *See* Oliver v. United States, 466 U.S. 170, 178, 183 (1984) (a person has no expectation of privacy in his "open fields," and thus government agents may trespass in their investigation, since "[t]he existence of a **property** right [is now] **but one element** in determining whether expectations of **privacy** are legitimate.") (emphasis added).

[14] *See* Smith v. Maryland, 442 U.S. 735, 741 (1979) (police are permitted to capture the numbers dialed by a person on his phone

incentivize theft,[15] based on a subjective determination that a person **had no reasonable expectation that the government would not do so.**

The notion of a reasonable expectation of privacy is a moving target, as the degree of privacy one may reasonably expect depends entirely on what technological powers of intrusion the government has at its disposal. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) (The reasonable expectation of privacy test "has often been criticized as circular, and hence subjective and unpredictable ... The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."). Writing for the majority in Kyllo, Justice Scalia recognized the abandonment of property for

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because he voluntarily conveyed them to the telephone company for the express purpose of placing a call); United States v. Miller, 425 U.S. 435, 442 (1976) (police can obtain a person's bank records from the bank because he voluntarily conveyed the information for the express purpose of banking). But a person who contracts with a third party to perform a service does not lose his property right to information created to perform that service.

[15] *See, e.g.*, California v. Greenwood, 486 U.S. 35, 40 (1988) (police permitted to search garbage bags that were placed at the curb "for the express purpose of conveying it to a third party...."); United States v. Hedrick, 922 F.2d 396, 398 (7th Cir. 1991) (police permitted to seize and search trash placed in cans on a person's property within the curtilage of his home). But the government may not open a person's outgoing mail just because he entrusted it to the Post Office for the express purpose of conveying it to the addressee. The government may not enter a person's home without a warrant on the theory that he had no privacy expectation since he had given a spare key to his neighbor for the express purpose of watering his plants while on vacation.

privacy, and clearly struggled with how to analyze thermal imaging using the Court's privacy precedents.[16]

B. United States v. Jones Returned the Fourth Amendment Jurisprudence to its Property Roots.

In 2012, the reign of Katz's reasonable expectation of privacy test appeared to have come to an end. In United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 953-54 (2012), the Court refused to sanction use of evidence gleaned from a government trespass on a person's private vehicle, and signaled a return to the property foundations of the Fourth Amendment. Writing for the majority in Jones, Justice Scalia recognized that "[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise ... the phrase 'in their persons, houses, papers, and effects' would have been superfluous." *Id.* at 949. The Court not only rejected the proposition that the Katz privacy test was the exclusive Fourth Amendment test, but also determined that the privacy test was subordinate to a primary property-based test. *Id.* at 953-54.

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[16] Indeed, the basis for the Kyllo decision has eroded because, since it was decided, thermal imaging technology, which had been experimental, grossly expensive, and "not in general public use," has proliferated to the point that sophisticated thermal imaging scopes are now widely available for under $2,000. *See* http://amzn.to/QXOjtZ.

The Court demoted the Katz privacy test, relegating it to the role of an "add-on," ruling that it would not be employed if it afforded less protection than the "18th century guarantee against unreasonable searches." Jones, 132 S.Ct. at 953. The Jones Court never needed to consider whether Jones had any "reasonable expectation of privacy" in his vehicle.[17] It held that Jones retained a property interest in his vehicle, even though he may not have had a reasonable expectation of privacy. It was enough that the government had engaged in a "physical intrusion of a constitutionally protected area in order to obtain information...." *Id.* at 951.

In Florida v. Jardines, 133 S.Ct. 1409 (2013), this Court went one step further in determining that, in any Fourth Amendment case, the search or seizure was first to be examined according to a property-based test. *Id.* at 1417.

Nevertheless, even after this Court's decisions in Jones and Jardines, the lower courts have persisted in using outdated and discredited "privacy" principles in Fourth Amendment cases, often completely disregarding the property principles at stake. Consistent with this pattern, the circuit court below never mentioned property in its analysis at all, and only once cited Jones, but in support of a privacy

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[17] Indeed, a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." United States v. Knotts, 460 U.S. 276, 281 (1983).

holding! *Id.* 728 F.3d at 14.[18] The circuit court reached the right conclusion in overturning Wurie's conviction, but did so based on privacy grounds. *See* Wurie, 728 F.3d at 11-13.

Remarkably, all parties in both the Wurie and Riley cases urge this Court to decide these cases based on privacy principles, as if Jones and Jardines had never been decided. The Court should resist this effort to re-establish privacy over property, both because the Fourth Amendment rests upon property-based principles, and because the privacy test undermines the historic protections secured by the text.

C. The Fourth Amendment Protects Property Interests.

Contrary to Katz and its myriad progeny, the original foundation of the Fourth Amendment was never based upon an evolving expectation of privacy, but upon fixed property principles. The prefatory clause states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." All four protected categories involve property rights. First and foremost, "every man has a property in his own person...." J. Locke, Second Treatise of Civil Government, Chapter 5, Sec. 27

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[18] In like manner, the defendants in Wurie and Riley rely on Justice Alito's concurring opinion in Jones, which rests upon privacy, not property. *See* Wurie Brief for Respondent at 11-12; Riley Brief for Petitioner at 56-57.

(1690).[19] From that property right in the person derives the private property right in "houses, papers, and effects," which are "[t]he labour of his body, and the work of his hands...." *Id.*

Indeed, to protect private property, man instituted civil government. W. Blackstone, Commentaries on the Laws of England, Book 2, Chapter 1, p. 8. *See also* Entick v. Carrington, 19 Howell's State Trials 1029 (1765) ("The great end, for which men entered into society, was to secure their property").

A person's private property rights protect him not only as against his fellow man, but also — and increasingly more importantly — against the government. Only when the government demonstrates that it has a superior property interest may it search or seize one's property — including his person. This Court embraced that principle in Boyd v. United States, 116 U.S. 616, 623 (1886).

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[19] *See also* Genesis 1:26 ("Let us make man in our image, after our likeness: and let them have **dominion** over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.") (emphasis added). Similar to that Biblical grant of authority, "property" is defined as "[t]hat **dominion** or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects." Black's Law Dictionary, West Publishing Co., Revised Fourth Edition, 1968, p. 1382 (emphasis added). Private property is defined as "that sole and despotic dominion which one man claims and exercises ... in total exclusion of the right of any other individual in the universe." *See* W. Blackstone, Commentaries on the Laws of England, Book 2, Chapter 1, "Of Property, in General," Univ. of Chicago facsimile ed: 1766, p. 2.

When the government intrudes upon a person's property without first demonstrating such a superior property interest, it is nothing more than a trespasser. Judge Cardozo wrote that "[t]he basic principle is this: Search of the person is unlawful when the seizure of the body is a **trespass**.... Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its **physical dominion**." People v. Chiagles, 237 N.Y. 193, 197 (N.Y. 1923) (emphasis added).

In this case, the dissenting circuit court judge attempted to downplay the government search, arguing that "[t]he police officers' **limited search** of one telephone number in Wurie's call log was even less intrusive than the searches in" other cases. United States v. Wurie, 728 F.3d 1, 15 (1st Cir. 2013) (emphasis added). In Jones, the government argued similarly that the placement of a GPS tracking device was at best a "**technical trespass**." Reply Brief for the United States in United States v. Jones, No. 10-1259, p. 2 (emphasis added). That *de minimis* type of argument was rejected in Jones, and should be rejected here, since "every [unjustified] invasion of private property, **be it ever so minute**, is a trespass." Entick v. Carrington, 19 Howell's State Trials 1029 (1765) (emphasis added).

D. The Fourth Amendment Protects Four Categories of Property Interests Which Are Afforded Separate and Distinct Protection.

Simply because the government is entitled to possess either a "person," "house," "paper," or "effect" does not mean it is thereby entitled to possess any, or all, of the other protected property interests. This principle is reflected in the second clause of the Fourth Amendment, which states that "no Warrants shall issue,[20] but upon probable cause, supported by Oath or affirmation, and **particularly describing the place to be searched, and the persons or things to be seized**." *Id.* (emphasis added). This "particularity requirement" ensures that each of the protected classes of property remains separate and distinct from the others.

Compromising one category does not negate the protections afforded to the others.[21] For example, police armed with an arrest warrant may be permitted

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[20] As Justice Scalia has noted in a concurrance, the "warrant requirement" has acquired problems of its own, and "had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions ... Since then, we have added at least two more." California v. Acevedo, 500 U.S. 565, 582 (1991).

[21] *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85, 92 (1979) ("a warrant to search a **place** cannot normally be construed to authorize a search of each **individual** in that place") (emphasis added); Chimel v. California, 395 U.S. 752 (1969) (An arrest of a **person** does not carry with it the authority to search the **place** within which he was found.).

to search a house in order to find the person named, but may not open a desk too small for the person to hide to search for papers and effects.[22] In this case, simply because the police may have been justified in making an arrest does not give them carte blanche authority to seize and conduct an exhaustive search of any property found on the arrestee, including the cell phone at issue.

III. SEARCHES INCIDENT TO ARREST ARE LIMITED TO EFFECTUATING THE ARREST, AND ARE NOT A GENERAL AUTHORITY TO SEARCH A PERSON'S BELONGINGS.

At common law, the authority to arrest was accompanied by a very limited power to separate the person being arrested from various objects that may be on his person. The purpose of this "search incident to arrest" is to effectuate the arrest, and "merely involve[s] a search of [the] person [not] a separate search of effects found on his person." United States v. Robinson, 414 U.S. 218, 255 (1973) (Marshall, J., dissenting). Thus, "[a]n officer, having made an arrest, is required to keep the prisoner **safely** until lawfully discharged; and, if the latter is **violent**, or if for any other reason an attempt at escape is apprehended, he may search his person to ascertain whether he has **implements to aid his escape**, and may take them away." J.P. Bishop, Criminal

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[22] *See* United States v. Ross, 456 U.S. 798, 824 (1982).

Procedure at § 210, Little, Brown & Co., 1880 (emphasis added).

Additionally, with respect to "either goods or money which he reasonably believes to be connected with the supposed crime, as its **fruits**, or as the **instruments** with which it was committed, **or as supplying evidence** relating to the transaction, he may **take them, and hold them** to be disposed of as the court shall direct." *Id.* at § 211 (emphasis added). It is important to note that this authority is only to "take and hold" the items, not to conduct a further warrantless, detailed examination of them, as was done with Wurie's cell phone here.

A. Upon Arrest, the Police Become the Bailee of the Person Arrested.

Indeed, the "arrest" underlying a search — the seizure of a person by the state — is best understood according to property principles. An "arrest" is defined as "the taking into custody of a person, or a person and his goods, in pursuance of some lawful command or authority." Criminal Procedure, § 156.

When a person is lawfully arrested, it is because the state has a superior property interest over his person. He is no longer free to exercise dominion over his body, to go where he wants, and to do as he pleases.

After a person is arrested, a judge may release a person eligible for "bail" on conditions. The bailment of a person is "the delivery, in legal form, of one under

arrest to another or others who thereby become entitled to his custody, and, with him, responsible for his appearance...." Criminal Procedure, § 248. However, even after a prisoner is "bailed out," he does not reacquire full property rights in his person. Instead, he is often limited in where he may go, what he may do, whom he may see, etc. Moreover, a bail bondsman who posts a bond obtains a property interest in the prisoner, and if it is believed the prisoner might "jump bail," "he may be detained by them and enforced to appear...." *Id.* at § 249.

B. The Government Is No More than a Bailee of Personal Property Seized Incident to Arrest.

The police arrested Wurie on suspicion of selling drugs, and "drove him to a nearby police station, where they seized two cell phones, a set of keys, and more than one thousand dollars in cash from his person." Pet. at 3. Seizures of such items might be justified — the cell phones and keys being possible implements of escape, and the cash being possible fruits of selling drugs, the crime of which Wurie was suspected. However the police search went much further than that. When one of the cell phones began receiving calls, the police "opened the phone to check its call log [and] obtain[ed] the number for 'my house.'" Pet. at 3.

By doing so, the police exceeded any property right they had in the cell phone and trespassed on Wurie's property, much the same as occurred in Jones when, without a warrant, the police placed a GPS tracking

device on Jones' car. If the police had probable cause sufficient to demonstrate Wurie's cell phone contained contraband or evidence of any crime, they could have applied for a warrant to search it.

A person retains a property interest in his belongings after his arrest. Criminal Procedure concludes that "[t]his taking of things from the arrested person **does not change the property in them**." *Id.* at § 212 (emphasis added). Since the purpose of searching someone upon arrest is to separate him from certain items, "once the [items are] in the officer's hands," the purpose of the search is complete and the officer is simply holding the property on behalf of the arrestee. *See* Robinson at 256 (Marshall, J. dissenting). Opening Wurie's cell phone is analogous to the improper police action taken in Robinson, where "[o]pening the package ... did not further the ... purpose of the search." *Id.*

When the police take possession of personal property incident to an arrest, they have no property interest in the items greater than that of a common law bailee. An officer "holds all such property, whether money or goods, subject to the order of the court; and, in proper circumstances, he will be directed to restore it, in whole or in part, to the prisoner." Bishop, Criminal Procedure, § 212. A bailment of the arrestee's property is properly viewed as "a delivery of goods or personal property ... in trust ... and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same...." Black's Law Dictionary, p. 179.

Story explained that "[i]n respect to property in the custody of the officers of a court, pending process and proceedings, such officers are undoubtedly responsible for good faith and reasonable diligence." J. Story, Commentaries on the Law of Bailments, sec. 620, Little & Brown, 1840. *See, e.g.*, American Ambassador Casualty Co. v. Chicago, 205 Ill. App. 3d 879 (Ill. App. Ct. 1st Dist. 1990) (police became involuntary bailees of a vehicle after the driver of the vehicle was arrested).

Having only the authority of a bailee of Wurie's cell phone, the police were required to hold it for safekeeping, but had no right to examine its contents without a warrant.

CONCLUSION

Justice Frankfurter explained the problem faced by courts in cases like Wurie when he wrote in Rabinowitz that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). However, the Court's decision in this case could affect virtually anyone.

This Court already has determined that police may arrest a person for any minor infraction, even if the maximum penalty does not include jail time. *See* Atwater v. Lago Vista, 532 U.S. 318 (2001). Consider the case of a lawyer arrested for a traffic offense. Is it to be the law that the police may scrutinize his smartphone, laptop, flash drive, iPad, briefcase, and

client files[23] — without warrant or suspicion of any wrongdoing — simply because he has failed to use his turn signal when merging?[24] If a lawyer's confidences should not be searched, why should any other person be given fewer rights?

It is widely believed that the Court's jurisprudence governing "searches incident to arrest" is in disarray, and this case presents the Court with the opportunity to establish principled limitations on the scope of such searches — limitations based on textual, well-established property principles, rather than on judge-made tests which balance away constitutional protections based on subjective notions of "expectations of privacy."

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[23] *See* U.S. v. Wurie, 728 F.3d at 7.

[24] The government argues in its opening brief that it may **always** search cell phones incident to arrest. U.S. Br. at 8. Only in the **alternative** does it argue that it may search cell phones **sometimes**, "'when it is reasonable to believe that evidence of the offense of arrest might be found....'" *Id.* at 10 (citation omitted). That alternative argument, the government suggests, "**would also dispel any theoretical concern that officers will use arrests for traffic offenses as pretexts to search cell phones.**" *Id.* at 11 (emphasis added). But again, that is only the government's **alternative** argument. In the government's perfect world, the police could comb through a person's entire electronic life after arresting him because one of his tires touched the double yellow line.

The decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 13-132 & 13-212

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID LEON RILEY,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the
California Court of Appeals, Fourth District

UNITED STATES OF AMERICA,
Petitioner,
v.
BRIMA WURIE,
Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* – PROFESSORS CHARLES E. MACLEAN & ADAM LAMPARELLO IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*

Amici Curiae Charles E. MacLean and Adam Lamparello[1] are assistant professors of law at Indiana Tech Law School in Fort Wayne, Indiana. They teach and write in the areas of criminal law, criminal procedure, and constitutional law, and have an interest in the sound development of the law in this area. They take the view that application of pre-digital age analogs and precedent to digital age technology is ill-advised and contrary to the Fourth Amendment, which, at a minimum, requires that searches be "reasonable" and enumerated with "particularity." Warrantless searches of digital storage devices, such as but not limited to smartphones, incident to lawful arrest, honor neither of those inviolable Fourth Amendment prongs.

Together or separately, *Amici* have written a number of articles regarding the application of the Fourth Amendment in the digital age, including: Charles E. MacLean, *But Your Honor, A Cell Phone is Not a Cigarette Pack: An Immodest Call for a Return to the Chimel Justifications for Searches of Cell Phone Memories Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 37 (2012); Charles E. MacLean, *Katz on a Hot Tin Roof: The Reasonable Expectation of Privacy Doctrine is Rudderless in the Digital Age*

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[1] All parties have consented to the filing of this amicus brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, their law school, or their counsel made a monetary contribution to its preparation or submission.

Unless Congress Continually Resets the Privacy Bar, 24 ALB. L.J. SCI. & TECH. 47 (2014); Charles E. MacLean & Adam Lamparello, *Abidor v. Napolitano: Suspicionless Cell Phone and Laptop "Strip" Searches at the Border Compromise the Fourth and First Amendments*, 108 NW. U. L. REV. COLLOQUY ___ (forthcoming 2014); and Adam Lamparello & Charles E. MacLean, *Back to the Future: Returning to Reasonableness and Particularity under the Fourth Amendment*, 99 IOWA L. REV. BULL. ___ (forthcoming 2014).

SUMMARY OF ARGUMENT

Warrantless searches of cell phone memory—*after* a suspect has been arrested, and *after* law enforcement has seized the phone—would have been unconstitutional at the time the Fourth Amendment was adopted, and are unconstitutional now. Simply stated, they are unreasonable. And reasonableness—not a categorical warrant requirement—is the "touchstone of Fourth Amendment analysis." *Oliver v. United States*, 466 U.S. 170, 177 (1984).

Searches of a cell phone's contents cannot be justified under the search incident to arrest doctrine because neither safety nor the preservation of evidence is implicated. *See Arizona v. Gant*, 556 U.S. 332, 339 (2009) (citing *Chimel v. California*, 395 U.S. 752, 763 (1963)). To be sure, after seizure by law enforcement, cell phones are no longer part of the "arrestee's person" or within the arrestee's "immediate control." *Id.* Furthermore, there is minimal risk of automatic or remote deletion.[2] Thus, "application of *Chimel* in this context should be entirely abandoned." *Gant*, 556 U.S. at 354 (Scalia, J., concurring).

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[2] *See, e.g.*, Samuel J. H. Beutler, *The New World of Mobile Communication: Redefining the Scope of Warrantless Cell Phone Searches*, 15 VAND. J. ENT. & TECH. L. 375, 394 (2013). (explaining that, "for an arrestee to effectively erase evidence ... (1) a phone must be enabled with remote wipe capabilities, (2) an accomplice must have access to the remote wipe program, and (3) there must exist some way for the arrestee to contemporaneously alert the accomplice of the arrest").

In addition, these searches are not supported by the vehicle inventory exception. Modern cell phones are not "articles inside the relatively narrow compass of the passenger compartment of an automobile," and *after* seizure by law enforcement are not within "the area into which an arrestee might reach.' " *Gant*, 556 U.S. at 341 (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)). They are in the hands of law enforcement. Not getting a warrant in this situation makes a mockery of the warrant requirement, its exceptions, and the reasonableness standard.

Cell phones are the modern day repository for the "papers" and "effects" that were stored in Eighteenth Century Colonial, Nineteenth Century Gothic Revival, and Twentieth Century Cape Cod homes. They store private correspondence, photographs, *personal thoughts*, and in some cases even the personal information of others. *See State v. Smith*, 920 N.E.2d 949, 954 (Ohio 2009). Within each "room" of a cell phone, individuals have an objective—and subjective—expectation of privacy against unreasonable searches and seizures. *See Katz v. United States*, 389 U.S. 347 (1967).

Given the recent advances in modern technology, the incompatibility with this Court's precedent, and the system-wide infringements that have occurred since *Belton*, the time has arrived to create a bright-line rule. As the Court recognized in *Gant*, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*."

Gant, 556 U.S. at 342 (quoting *Thornton v. United States*, 541 U.S. 615, 624 (2004)) (O'Connor, J., concurring). Indeed, some courts have upheld searches under *Belton* "even when . . . the handcuffed arrestee has already left the scene." *Id.* (quoting *Thornton*, 541 U.S. at 629 (O'Connor, J., concurring)). That same entitlement prevails in the context of post-arrest, post-seizure cell phone searches. It should stop now, or cell phone searches may become the modern day general warrant. In some cases—such as *Riley*—they already have.

Relying on precedent from an era of black-and-white televisions would allow this practice to continue, and would stretch the search incident to arrest doctrine "beyond its breaking point." *Thornton*, 541 U.S. at 620, 625 (Scalia, J. concurring); *see also People v. Diaz*, 244 P.3d 501, 516-17 (Cal. 2011)) (Werdegar, J., dissenting) ("[t]he United States Supreme Court's holdings on clothing and small spatial containers were not made with mobile phones, smartphones and handheld computers—none of which existed at the time—in mind"). Indeed, the Court has "never relied on *stare decisis* to justify the continuance of an unconstitutional police practice . . . that is so easily distinguished from the decisions that arguably compel it." *Gant*, 556 U.S. at 348.

Professors MacLean and Lamparello respectfully submit that the Court should adopt a rule allowing law enforcement to seize an arrestee's cell phone, but prohibiting a search of its contents without probable cause and a warrant describing with particularity

the "rooms" to be searched.[3]

The only exception should be where law enforcement officers are faced with an *imminent* threat to life or safety.[4] Even then, however, the search should be proportionate to the nature and duration of the exigency, and not as a pretext to go on a fishing expedition for evidence of any crime whatsoever. Absent an exigent circumstance, searches of cell phone contents should be *ipso facto* unreasonable. The modest inconvenience to law enforcement is a small price to pay to prevent the unconstitutional infringements upon privacy that result when law enforcement officers, without a warrant, search cell phones incident to arrest.

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[3] *See* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010) (discussing the particularity requirement in the context of internet searches). When either a search warrant or an exigency allows a law enforcement officer to "search" a cell phone, neither should occur without specifically enumerating the particular parts or "rooms" of the cell phone the officer is authorized to search. Just as an officer cannot constitutionally look inside an envelope when the officer is only authorized by the warrant or exigency to look for a stolen automobile, nor should any computer or cell phone "search" ever authorize a blunderbuss search of the entirety of its memory, that is, a search of all its "rooms," without regard to whether the probable cause provided sufficient justification and nexus for all of those "rooms." Both the "particularity" and the "reasonableness" prongs of the Fourth Amendment compel that particularity, without which the search cannot be deemed reasonable.

[4] Whether this requires an exception in every case is a separate issue.

Professors MacLean and Lamparello also counsel against carving out a narrow exception where officers have "reason to believe evidence relevant to the crime of arrest" will be found in the phone. *Gant*, 556 U.S. at 341 (quoting *Chimel*, 395 U.S. at 763). Such standard would not "provide the needed guidance to arresting officers," and would leave "much room for manipulation." *Gant*, 556 U.S. at 353 (Scalia, J., concurring). That distinction threatens to swallow the rule and is a recipe for arbitrariness of the most unreasonable—and unconstitutional—kind.

Ultimately, there can be no doubt—in an era of unprecedented technological advances—that individual privacy is under attack by state action that neither the Fourth Amendment nor basic notions of liberty countenance. Smartphones are now owned and operated by fifty-five percent of the population[5] and transcend the finite physical space that is traditionally subject to searches incident to arrest or other exceptions to the warrant requirement. Warrantless, post-arrest searches of cell phones therefore implicate privacy interests that the Fourth Amendment, at the time of its adoption and throughout its evolution, safeguards against arbitrary government intrusion. These searches are unnecessary, unreasonable, and unconstitutional.

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[5] *See, e.g.*, Pew Research Internet Project, *Mobile Technology Facts Sheet, available at* http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/.

ARGUMENT

I. WARRANTLESS, POST-ARREST SEARCHES OF A CELL PHONE ARE UNREASONABLE AND NOT JUSTIFIED BY ANY EXCEPTION TO THE WARRANT REQUIREMENT.

The Fourth Amendment does not categorically require a warrant. It demands reasonableness.[6] And a "warrantless search of the person is reasonable only if it falls within a recognized exception." *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013). Warrantless searches of cell phones fall within no exception. And for good reason. They offend even the most relaxed definition of reasonableness.

In *Smith v. Ohio*, the Court explained that "[a]lthough the Fourth Amendment may permit a brief *detention* of property on the basis of only 'reasonable, articulable suspicion' that it contains contraband or evidence of criminal activity, it proscribes—except in certain well-defined circumstances—the search of that property unless accomplished pursuant to judicial warrant issued upon probable cause." 494 U.S. 541, 542 (1990)

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[6] *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized").

(*quoting United States v. Place*, 462 U.S. 696, 702 (1983)); *see also Skinner v. Railway Labor Execs' Ass'n*, 489 U.S. 602, 619 (1989); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz*, 389 U.S. at 357. A brief discussion of the character of cell phones demonstrates that they do not fall within the warrant requirement's "established and well-delineated exceptions." *Katz*, 389 U.S. at 357.

A. Individuals Have an Objectively Reasonable Expectation of Privacy in the Content of their Cell Phones.

Cell phones are unlike any of the objects that this Court has confronted in its jurisprudence. *See, e.g., California v. Greenwood*, 486 U.S. 35, 40 (1988) (trash left on the curb); *Oliver*, 466 U.S. 170 (objects or activities in open fields) (1984); *Hudson v. Palmer*, 468 U.S. 517 (1984) (items in prison cells); *United States v. Chadwick*, 433 U.S. 1 (1977) (footlocker), *abrogated by California v. Acevedo*, 500 U.S. 565 (1990); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (cars); *United States v. Edwards*, 415 U.S. 800 (1974) (clothing).

The above cases establish three levels or gradations of privacy. First, privacy expectations "that society is prepared to recognize as legitimate have, at least in theory, the greatest protection." John P. Cronan, et al., *Fourth Amendment Trends and the Supreme Court's October 1999 Term*, 19

YALE L. & POL'Y REV. 197, 200 (2000) (quoting Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 331 (1998)) (internal quotations and footnotes omitted). Houses, for example, fall within this group. Cronan, *supra*, at 200. Areas where an individual has "diminished expectations of privacy are more easily invaded." *Id.* (*quoting* Clancy, *supra*, at 331). Cars have been placed in this group. *Opperman*, 428 U.S. at 367. Finally, "subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection." Cronan, *supra*, at 200 (*quoting* Clancy, *supra*, at 331).

Cell phones deserve the highest privacy protections. They transcend physical boundaries and finite space, shatter the distinctions between public thoroughfares and private homes, and store the "papers" and "effects" that, in the pre-digital era, were kept in the privacy of one's home. These items are not rendered searchable simply because they are stored in a cell phone rather than a closet. *See Chadwick*, 433 U.S. at 13. ("the footlocker's mobility [does not] justify dispensing with the added protections of the Warrant Clause").

That principle applies with particular force here. In the cell phone context, mobility and location are less relevant. The more pertinent inquiry should focus on the diverse array of deeply personal contents that can—and are—stored within cell phones, as well as the ubiquity of cell phones in contemporary life. As one court aptly described, we now live in a "cell-

phone centric" society. *Klayman v. Obama*, 957 F. Supp. 2d 1, 36 (D.D.C. 2013).

Cell phones cannot be analogized to a crumpled up cigarette package, address book, wallet, or container. *See Robinson*, 414 U.S. at 236; *United States v. Rodriguez*, 995 F.2d 778, 778 (7th Cir. 1993); *Acevedo*, 500 U.S. at 575-76. That would be like comparing a rotary telephone to a Smartphone.

Unlike a container, for example, a cell phone is not an "object capable of holding another object." *Belton*, 453 U.S. at 460 n.4. Moreover, cell phone contents are "limited to digital data, the intangible nature of which renders it unavailable for use as a weapon or as evidence that can be physically destroyed." Joshua Eames, *Can You Hear Me Now? Warrantless Cell Phone Searches and the Fourth Amendment: People v. Diaz, 244 P.3d 501 (Cal. 2011)*, 12 WYO. L. REV. 483, 499 (2012).

Also, "modern cell phones are capable of accessing almost limitless amounts of data," and "[e]ven the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container." *Id.*; *see also* Jana L. Knott, *Is There an App for That? Reexamining the Doctrine of Search Incident to Lawful Arrest in the Context of Cell Phones*, 35 OKLA. CITY U. L. REV. 445, 456 (2010).

But it is the quality, not simply the quantity, of data that distinguishes cellphones from parked cars, passenger compartments, pagers, and plastic containers:

> [M]odern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.

United States v. Park, No. CR 05–375 SI, 2007 WL 1521573, at *9 (N.D. Cal. May 23, 2007). ("[a]lthough information of this nature can now be stored electronically, in the past such information has traditionally been stored in one's home office or desk and given protection by the Fourth Amendment"). Put differently, people do not store confidential documents in a Rolodex, and they do not watch YouTube videos in a suitcase.

As such, relying on cases from an era of rotary phones and black-and-white televisions is akin to relying on the plain view doctrine to justify pulling apart the curtains of someone's home to get a glimpse into their private life. While precedent is vital to ensuring predictability and consistency, it has less importance in this case. And stare decisis "does not compel us to follow a past decision when its

rationale no longer withstands 'careful analysis.'" *Gant*, 556 U.S. at 348 (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)).

The "potential intrusion on informational privacy involved in a police search of a person's mobile phone, smartphone, or handheld computer," is substantial. *Diaz II*, 244 P.3d at 513 (Werdegar, J., dissenting). The justifications for searching these items without a warrant, however, are not. Noting that the amount of information that can be stored on a cell phone "dwarfs that which can be carried on the person in a spatial container," Judge Werdegar criticized the *Diaz* majority for "indulg[ing] a fiction that an item that was on the arrestee's person when he was detained is *still* on his person—and thus vulnerable to destruction of evidence—notwithstanding that the arrestee is safely in custody and the item securely in police control." *Id.* at 515.

The threats to privacy are particularly acute because cell phones have become "attractive targets for criminal investigators, providing a wealth of evidence such as lists of recent incoming and outgoing calls, text messages, and possibly incriminating photographs." Lily R. Robinton, *Courting Chaos: Conflicting Guidance From Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence*, 12 YALE J.L. & TECH. 311, 315 (2010); Ashley B. Snyder, Note, *The Fourth Amendment and Warrantless Cell Phone Searches: When is Your Cell Phone Protected?*, 46 WAKE FOREST L. REV. 155, 163 (2011). To make matters worse, law enforcement can search for incriminating evidence by "just 'thumbing through'

the cell phone." Snyder, *supra* at 163.

Not only does this "increase the likelihood that highly personal information that is irrelevant to the subject of the lawful investigation will also be searched," but it also demonstrates the reasonableness, under *Katz*, of finding that an individual has a constitutionally protected expectation of privacy in cell phones. And it underscores the unreasonableness of searching cell phones unless law enforcement has a warrant, or is confronted with an exigent circumstance.

B. THE SEARCH INCIDENT TO ARREST DOCTRINE DOES NOT SUPPORT WARRANTLESS, POST-ARREST CELL PHONE SEARCHES.

As the Court stated in *Gant*, the "the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." 556 U.S. at 339. A cell phone implicates neither of these concerns—particularly after it is seized.

1. Safety is Not a Concern.

A cell phone is not—and cannot—be used as a weapon,[7] and "cannot hide weapons."[8] Thus, the

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[7] *See e.g.*, Marty Koresawa, *Pay Phone Protections in a Smart Phone Society: The Need to Restrict Searches of Modern Technology Incident to Arrest*, 45 LOY. L.A. L. REV. 1351, 1389

distinctions established in search incident to arrest jurisprudence, including "immediate control," and "lunging area," which were driven by safety concerns, do not apply in the cell phone search context. *Gant*, 556 U.S. at 339 (*quoting Chimel*, 395 U.S. at 763); *Diaz II*, 244 P.3d at 505. In *Gant*, Justice Scalia stated as follows:

> Since the historical scope of officers' authority to search vehicles incident to arrest is uncertain . . . traditional standards of reasonableness govern. It is abundantly clear that those standards do not justify what I take to be the rule set forth in *New York v. Belton* . . . and *Thornton*: that arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons. When an arrest is made in connection with a roadside stop, *police virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car*

Gant, 556 U.S. at 351-52 (Scalia, J., concurring).

(2012).

[8] *Id.* at 1389.

The same "less intrusive" means are available in the cell phone context. Police can seize the phone, and subsequently procure a warrant to search its contents.

2. Evidence Will Not Be Destroyed.

The only issue that ever arguably arises in a cell phone memory search context relates to the preservation of evidence. Importantly, however, unless an arrestee's cell phone has minimal storage capacity, an automatic delete function, or can be remotely deleted by a third party, the risk of losing evidence is remote.[9]

Modern cell phones "no longer store only a handful of recent text messages and phone calls and greatly expanded digital memories eradicate any real risk of automatic deletion."[10] Also, even though remote deletion "pose[s] a real and substantial risk of destroying evidence,"[11] it depends on factors that law enforcement can mitigate by *seizing*—but not *searching*—the phone. As one commentator explains, "for an arrestee to effectively erase evidence . . . (1) a phone must be enabled with remote wipe capabilities, (2) an accomplice must have access to the remote wipe program, and (3) there must exist some way for the arrestee to *contemporaneously alert*

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9 *See* Mireille Dee, *Getting Back to the Fourth Amendment: Warrantless Cell Phone Searches,* 56 N.Y.L. SCH. L. Rev. 1129, 1152 (2012).

10 *See, e.g.,* Beutler, *supra* note 2, at 394.

11 *Id.* at 395.

the accomplice of the arrest."[12] And even wiped data can often be forensically recovered.[13]

C. The Motor Vehicle Exception Does Not Support the Warrantless, Post-Arrest Search of a Cell Phone.

The Court has set forth several instances when a vehicle may be searched without a warrant. The first "permit[s] an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant,* 556 U.S. at 346. An officer may also search a "vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to "gain immediate control of weapons." *Gant,* 556 U.S. at 346-47 (quoting *Michigan v. Long,* 463 U.S. 1032, 1049 (1983)).

Additionally, a warrantless search of the entire vehicle is permissible if "there is *probable cause* to believe a vehicle contains evidence of criminal activity." *Gant,* 556 U.S. at 347 (*citing United States*

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[12] *Id.* (emphasis added).

[13] *See* David Goldman, *How police can find your deleted text messages,* CNN (May 22, 2013), *available at* http://money.cnn.com/2013/05/22/technology/mobile/smartphone-forensics/; *see also United States v. Seiver,* 692 F.3d 774, 776 (7th Cir. 2012) (deleted file recovery in a computer context).

v. Ross, 456 U.S. 798, 820–21 (1982)) (emphasis added); *see also Maryland v. Buie*, 494 U.S. 325, 334 (1990) (a limited protective sweep of a home is permissible in areas where an officer believes a dangerous person may be hiding). Finally, although *Ross* authorizes even broader searches for "evidence relevant to offenses other than the offense of arrest," it is intended to safeguard "*genuine* safety or evidentiary concerns" encountered during the arrest of a vehicle's recent occupant. *Gant*, 556 U.S. at 347 (emphasis added).

Proffered concerns about safety or preserving evidence in cell phone searches incident to arrest are not credible. They are pretext to go on a fishing expedition. Based on the quantity and quality of private information stored in cell phones, law enforcement has virtually unlimited access to an arrestee's private life, including confidential communications in a personal or professional setting, intimate messages to family members and loved ones, and internet search history. Furthermore, the only event that triggers such a search is the arrest itself, regardless of whether it is for Driving under the Influence of Alcohol or Premeditated Murder. And it is not intended to protect officer safety, preserve evidence, or even search for evidence relating to the crime of arrest. It is to search for any evidence of any crime in any *room* that law enforcement desires. In a nutshell, that is the essence of a general warrant.

To be sure, it is one thing to use a pen register to track a suspect's outgoing calls from a private residence. *See Smith v. Maryland*, 442 U.S. 735

(1979) (holding that law enforcement could use a pen register to track outgoing telephone calls from a suspect's private residence). It is quite another to go on a fishing expedition for evidence of any crime, particularly when there are no reasons to justify the search, and nothing to prevent law enforcement from seizing the phone and subsequently obtaining a warrant. There is nothing reasonable about this practice.

And reasonableness is the foundation for every exception to the warrant requirement. Under the public safety exception, for example, it is reasonable to allow officers to forego a search warrant prior to entering a building where they hear screams for help as they approach. *See United States v. Barone*, 330 F.2d 543, 544-45 (2d Cir. 1964), *cert. denied*, 84 S. Ct. 1940 (1964)). A plain view search is likewise reasonable; the officers had a right to be present where they saw the inculpating item in plain view, thus we need not call it a "plain view" search – under the Constitution, it is a reasonable search – the "plain view" label is just veneer. *See Coolidge v. New Hampshire*, 403 U.S. 443, 464-69 (1971).

On the other hand, it is not reasonable to conduct a warrantless search of a cell phone's memory merely because it was in the arrestee's pocket. The officer's safety is not threatened. There is little, if any, risk that the information will be deleted. Thus, relying on the "search incident to arrest" exception in this context is not merely stretching the doctrine "beyond its breaking point"; it is stretching reasonableness to a place that this Court should not be willing to go.

Thornton, 541 U.S. at 625 (Scalia, J. concurring).

Ultimately, the reason this Court has not endorsed a categorical warrant requirement is identical to that which gave rise to the above exceptions: it was reasonable to do so. Searching cell phones without a warrant or demonstrable exigency fails to satisfy this standard.

II. THE *RILEY* COURT APPLIED OLD, INAPPOSITE DOCTRINE TO A NEW PROBLEM, AND THE *WURIE* COURT DID NOT PROVIDE THE NECESSARY EXCEPTION FOR EXIGENT CIRCUMSTANCES.

A. *People v. Riley*.

In *People v. Riley*, the California Court of Appeals followed *Diaz*,[14] and upheld the warrantless search of defendant's cell phone because it was, "immediately associated with his person when he was arrested, and therefore the search of his cell phone was lawful whether or not an exigency still existed." *See People v. Riley*, No. D059840, 2013 WL 475242, at *6 (Cal. Ct. App. 4 Dist. Feb. 8, 2013), unpublished/noncitable, *review denied* (May 01, 2013), *cert. granted in part*, Riley v. California, ___ S. Ct. ___, No. 13-132, 2013 WL 3938997, 82 U.S.L.W. 3082 (Jan. 17, 2014). The California Court of Appeals reached the wrong result. The search was unlawful because it was not reasonable.

Even if the cell phone was immediately associated with Riley's "person," it neither threatened the officers' safety nor presented a risk that evidence would be destroyed. Tellingly, the Court of Appeals made no attempt to establish a

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[14] 81 Cal. Rptr. 3d 732 (Cal. Ct. App. 2008) ("*Diaz I*"), *aff'd*, 244 P.3d 501 (Cal. 2008) ("*Diaz II*"); *cert. denied sub. nom.*, *Diaz v. California*, 132 S. Ct. 94 (Oct. 3, 2011).

nexus between the *Chimel* justifications and the subsequent search of Riley's cell phone. Instead, the California Court of Appeals permitted an unfettered search of Riley's cell phone, essentially sanctioning a suspicionless fishing expedition into his personal life. As Judge Werdegar noted in his dissent, the majority's decision "sanctions a highly intrusive and unjustified type of search, one meeting neither the warrant requirement nor the reasonableness requirement of the Fourth Amendment to the United States Constitution." 244 P.3d at 518.

In doing so, the California Court of Appeals failed to make an important distinction between the privacy interests at stake. And that distinction is what lies at the heart of this case. The individual's expectation of privacy is not in a cell phone *as an object*, but as the safe keeper of the "papers" and "effects" that the Fourth Amendment has *always* deemed private. *See Diaz*, 244 P.3d at 517 (Werdegar, J., dissenting) ("the grounds for deeming an arrestee to have lost privacy rights in his or her *person* do not apply to the privacy interest in *data* stored on electronic devices"). In *Diaz*, Judge Werdegar explained as follows:

> In *Robinson*, the Supreme Court . . . explained that while warrantless searches of the person are ordinarily unlawful, [s]earch of the person becomes lawful when grounds for arrest and accusation have been discovered, and *the law is in the act of subjecting the body of the accused to its physical dominion* . . . It does not follow,

> however, that the police also have "'dominion . . . over the entirety of stored messages, photographs, videos, memoranda and other records an arrestee may be carrying on a mobile phone or smartphone. That an arrestees interest in his or her own privacy' " . . . is severely reduced does not imply a corresponding reduction in privacy of personal and business data. Even when they happen to be stored on a device carried on the person, these records are clearly distinct from the person of the arrestee.

Id. at 517-18 (Werdegar, J., dissenting) (*quoting Robinson,* 414 U.S. at 232; *Edwards,* 415 U.S. at 809). Put differently, "[a]n individual lawfully arrested and taken into police custody necessarily loses much of his or her *bodily* privacy, but does not necessarily suffer a reduction in the *informational* privacy that protects the arrestee's records." *Id.* at 517.

Surely, an individual has at least *some* expectation of privacy in personal documents stored on a cell phone, videos downloaded from YouTube, or private emails sent from an email account. While this does not immunize the information from a valid search, it does require law enforcement to have probable cause and a warrant—or sufficient justification for proceeding under one of the exceptions to the warrant requirement—before rummaging through such private space.

In *Riley,* law enforcement had neither, and the California Court of Appeals' "fanciful reliance upon

officer safety [should be recognized] for what it was: "a return to the broader sort of [evidence-gathering] search incident to arrest that we allowed before *Chimel*." *Thornton*, 541 U.S. at 631 (Scalia, J., concurring).

Of course, there is nothing problematic about saying that a cell phone is "immediately associated" with the person, if this term is construed as an association with the person's thoughts, private "papers," and personal "effects." Note, *Looking Back to Look Forward: Reexamining the Application of the Third-Party Doctrine to Conveyed Papers*, 37 HARV. J.L. & PUB. POL'Y 329, 330 (2014).

In *Wurie*, however, the First Circuit got it right, cell phone data searches are *categorically* unlawful under the search incident to arrest exception, given the government's failure to demonstrate that they are ever necessary to promote officer safety or prevent the destruction of evidence. *See Katz*, 389 U.S. at 353.

B. *United States v. Wurie.*

The First Circuit's decision in *Wurie* drew a better, but not sufficiently brighter, line. The Court recognized that unrestricted searches of an arrestee's cell phone were anything but reasonable:

> Since the time of its framing, "the central concern underlying the Fourth Amendment" has been ensuring that

> law enforcement officials do not have "unbridled discretion to rummage at will among a person's private effects" . . . Today, many Americans store their most personal "papers" and "effects," in electronic format on a cell phone, carried on the person. Allowing the police to search that data without a warrant any time they conduct a lawful arrest would, in our view, create "a serious and recurring threat to the privacy of countless individuals."
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> * * *
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> In reality, "a modern cell phone is a computer," and "a computer . . . is not just another purse or address book."

728 U.S. 1, 8, 14 (1st Cir. 2013) (internal citations omitted); *see also United States v. Jones*, 132 S. Ct. 945, 950 (2012) ("[a]t bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted'") (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

The First Circuit also recognized that the information stored on cell phones is the type of "information one would previously have stored in one's home and that would have been off-limits to officers performing a search incident to arrest."

Wurie, 728 U.S. at 8. The court stated as follows:

> Just as customs officers in the early colonies could use writs of assistance to rummage through homes and warehouses, without any showing of probable cause linked to a particular place or item sought, the government's proposed rule [allowing searches of cell phone memories as a bright-line rule] would give law enforcement automatic access to "a virtual warehouse" of an individual's "most intimate communications and photographs without probable cause" if the individual is subject to a custodial arrest, even for something as minor as a traffic violation.

Id. at 8-9.

Finally, the First Circuit flatly rejected the search incident to arrest justification, holding that "warrantless cell phone data searches strike us as a convenient way for the police to obtain information related to a defendant's crime of arrest – or other, as yet undiscovered crimes – without having to secure a warrant." *Id.* at 12-13. As the court correctly noted, "nothing in the Supreme Court's search-incident-to-arrest jurisprudence that sanctions such a general evidence-gathering search." *Id.* (quoting *Thornton* 541 U.S. at 632 (Scalia, J., concurring)).

More recently, in *Klayman,* the United States District Court for the District of Columbia held that

the National Security Agency's ("NSA") surveillance program, which consisted of the suspicionless collection of cell-phone metadata, likely constituted a search under the Fourth Amendment. 957 F. Supp. 2d at 37. In so holding the court explained that, because "people in 2013 have an entirely different relationship with phones than they did thirty-four years ago," the Government "metadata collection and analysis almost certainly does violate a reasonable expectation of privacy." *Id.* at 32, 36. The court recognized the "rapid and monumental shift towards a cell-centric culture," where metadata from each person's phone reveals " 'a wealth of detail about her familial, political, professional, religious, and sexual associations.' *Id.* at 36 (quoting *Jones*, 132 S. Ct. at 955-56). As this Court noted in *City of Ontario v. Quon*, "[t]hat might strengthen the case for an expectation of privacy." 560 U.S. 746, 760 (2010).

It does strengthen the case because times have changed. So too should this Court's view of privacy in the cell phone search context, which implicates privacy in ways that pre-digital case law could not foresee. *See United States v. Seljan*, 547 F.3d 993, 1014 (9th Cir. 2008) (Kozinski, J., dissenting), *cert. denied*, 129 S. Ct. 1368 (2009) ("[t]he reference to papers [in the Fourth Amendment] is not an accident; it's not a scrivener's error. It reflects the Founders' deep concern with safeguarding the privacy of thoughts and ideas--what we might call freedom of conscience--from invasion by the government"). Searching a cell phone's memory is, in essence, searching persons *and* their "papers," memories, thoughts, and historical locations. It gives

law enforcement license to forage through an individual's private life—and *mind*—where less intrusive methods are available to safeguard law enforcement's evidence gathering function.

III. ALLOWING THE SEIZURE OF AN ARRESTEE'S CELL PHONE, BUT PROHIBITING ITS WARRANTLESS SEARCH ABSENT EXIGENT CIRCUMSTANCES, PRESERVES LAW ENFORCEMENT'S INTERESTS AND PROTECTS PRIVACY.

Professors MacLean and Lamparello respectfully submit that the pragmatic approach would be to: (1) allow law enforcement to seize an arrestee's cell phone; (2) require a warrant and probable cause to search the phone's contents; and (3) provide a narrow exception for imminent substantial threats to human life and safety. This standard would bring more certainty and guidance in a jurisprudence that is currently unsettled. *See Diaz,* 51 Cal. 4th at 518 (Werdegar, J., dissenting) (instead of searching an arrestee's cell phone without a warrant, "the item can be taken from the arrestee and securely held until (assuming probable cause for a search exists) a warrant has issued").

In *Gant*, the Court inched in this direction when it held that a motor vehicle search incident to arrest was improper. 556 U.S. at 351-52. The Court recognized that, because the officers' safety was not at risk, and, because they had no reason "to believe evidence relevant to the crime of arrest might be found in the vehicle," there was no justification for

the search. The same is true here.

The time has come for a bright-line rule recognizing that individuals have an objectively reasonable expectation of privacy in the contents of their cell phones. That means the following: seizing the phone is permissible because it would prevent an arrestee from destroying evidence, coordinating with third parties to endanger officer safety, or remotely deleting the cell phone's memory. On the other hand, searching it without a warrant and probable cause, "would give authorities an open door into the most private details of an arrestee's life."[15] The only exception is when officers are faced with exigent circumstances. But the Court must also define the contours of this exception, so that it is not used to circumvent the rule.

A. *Remote Deletion is not a Sufficient Exigency.*

As discussed above, "[r]apid improvements in technology . . . have obviated the . . . concern[]" that "incoming calls or messages will replace recent calls or messages in a phone's memory." Beutler, *supra* note 2, at 394. Riley, Wurie, and other *Amici* have covered this issue at length. Remote deletion is such an attenuated risk, that it cannot suffice to justify a warrantless cell phone memory search incident to arrest.[16]

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[15] *Id.* at 1064.

[16] Even where officers are aware of an actual and specific risk of remote deletion, that risk can be obviated by the simple and

B. *Imminent and Substantial Threats to Life and Safety are Sufficient Exigencies.*

Where law enforcement officers have an objectively reasonable belief that an "immediate threat to [human] life or safety" exists, they should be entitled to search a cell phone without a warrant, limited to the areas ("rooms") in the cell phone where evidence relevant to the exigency itself could reasonably be found. Clifford S. Fishman, *Searching Cell Phones After Arrest: Exceptions to the Warrant and Probable Cause Requirements,* 65 RUTGERS L. REV. 995, 1002 (2013); *see also Michigan v. Fisher,* 558 U.S. 45, 47 (2009); *Diaz,* 244 P.3d at 518 (Werdegar, J., dissenting) ("where the arresting officers have reason to fear imminent loss of evidence from the device, or some other exigency makes immediate retrieval of information advisable, warrantless examination and search of the device would be justified").

One scholar explains the exigent circumstances exception as follows:

> [P]olice may enter premises and conduct a search without a warrant "to provide emergency assistance to an occupant," or to "enter a burning building to put

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inexpensive safeguards available today (for example, turn the phone off, remove its battery, place the phone in a Faraday enclosure, or make a mirror image of the phone's memory for subsequent search only *if and when* the officers obtain a search warrant).

> out a fire and investigate its cause." In such cases, the law not only dismisses the warrant requirement--in appropriate circumstances, the police may act even in the absence of probable cause.

Fishman, *supra* at 1003. Furthermore, to prevent the exception from swallowing the rule, law enforcement should be required to show that it had a reasonable belief that the exigency presented an imminent and substantial threat to the life or physical safety of others. While law enforcement does not need "ironclad" proof of an exigency, the Court should require that it does not encompass any threat, no matter how attenuated or speculative. *Fisher,* 558 U.S. at 49. The belief must be reasonable—as the Fourth Amendment requires.

It should also be sufficiently particular. A constitutional search pursuant to such an exigency must be limited to areas within the cell phone that are likely to uncover evidence relating to the exigency. In some situations, this may include initiating or responding to a call or text message, or reviewing the arrestee's recent phone calls or emails. Fishman, *supra* at 1004-05. It should not, for example, give officers license in every case to search the arrestee's Google search history or purchases on Amazon.com. Additionally, the search must cease when the exigency dissipates, or when officers discover evidence—in the cell phone or elsewhere—that allows them to effectively address the problem.

C. *The "Reasonable Relationship" Doctrine is Unworkable in the Cell Phone Context.*

What worked in *Gant*—which involved the search of an automobile—does not work when applied to cell phones. In other words, searches should not be allowed simply because the cell phone may contain evidence related to the crime of arrest. *See Gant,* 556 U.S. at 351. A cell phone stores far more information than can be found in a passenger compartment, a trunk, or a few closed containers.

Thus, the risk that officers will simply rummage through all "rooms" of the cell phone in an unfettered search for evidence far outweighs the convenience to law enforcement. Furthermore, given the minimal, even non-existent, risk that a cell phone's memory will be destroyed, there exist no reasons whatsoever that could justify such a warrantless search. Requiring officers to, instead, procure a warrant will allow a magistrate judge to confine the scope of every search, and describe with particularity the areas of a cell phone that are properly subject to a search.

D. *The "Third Party Doctrine" is Unworkable in the Digital Age.*

Some courts have relied on the third-party doctrine to hold that a cell phone user's Google searches and sent emails constitute a voluntary disclosure (thus surrendering Fourth Amendment protections), because the user knows that the search or email will be transmitted through a server. Jeremy H. Rothstein, *Track Me Maybe: The Fourth*

Amendment and the Use of Cell Phone Tracking to Facilitate Arrest, 81 FORDHAM L. REV. 489, 506 (2012) (discussing United States v. Miller, 425 U.S. 435, 442-43 (1976)).

Importantly, however, "the Supreme Court decisions that established the third-party doctrine are decades old," and cell phones, just as they are not containers or address books, are unlike "bank records voluntarily conveyed to banks in the ordinary course of business." *Id.* at 507-08 (discussing *Miller*, 425 U.S. at 442-43). They are also not comparable to "exposing numerical information to the telephone company," because individuals should not be required to "assum[e] the risk that the company would turn over that information to the government." *Id.* at 506.

If this reasoning were applied to cell phones, it would, in effect, condition the downloading and storage of traditionally private information, *e.g.*, confidential legal documents, upon the knowing waiver of constitutional rights. No conception of constitutional reasonableness can support this view, because it would result in an unconstitutional chill, through a *de facto* prior restraint, on speech and other expressive activity.

It would also require the assumption, under *Katz*, that individuals do not have an objectively reasonable expectation of privacy[17] in *otherwise-*

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[17] *Katz* came to be seen as having held that the Fourth Amendment is triggered only where an individual can demonstrate both an objective and subjective expectation of privacy. 389 U.S. at 361-62 (Harlan, J., concurring).

private material simply because they know it may be viewed by an unidentified third party, for whatever reason, and disclosed to the government, for no reason. That logic might work for bank records that are given to tellers, or numbers that are dialed from a home phone. But it goes too far when applied to private information that reveals intimate details about individuals, and embraces a concept of disclosure that is incompatible with the role cell phones play in the digital age. Individuals using their cell phones to send text messages or emails, for example, are not 'disclosing' information in the traditional sense; they are capitalizing on the efficiency cell phones offer and the ubiquitous role they play in modern human interaction. Comparing a Google search to the act of handing over bank records to a teller fails to appreciate these differences, and ignores the fact the 'disclosure' in this context is not to a single person, but to the entire world. That requires more, not less, protection.

IV. THE COURT'S RULES IN THESE CASES WILL DRIVE CONSTITUTIONAL JURISPRUDENCE FOR DECADES NO MATTER WHERE THE DIGITAL AGE LEADS US; IT IS ESSENTIAL, THEREFORE, THAT THE COURT FASHION A BROAD RULE.

In the same way that *Katz* drove Fourth Amendment jurisprudence far beyond the phone booth,[18] the Court's decisions in these cases will

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[18] As surveyed by Louisville Professor Russell Weaver, *Katz* has been applied to digital era cases as disparate as officer use

drive Fourth Amendment rights far beyond flip phones, iPhones, and any other snapshot of today's digital age technologies. It is, therefore, incumbent on the Court to issue a bright-line rule that provides clear guidance to law enforcement, and added protections for individuals.

The Court's decision will also guide lower courts for decades as they struggle with new factual scenarios brought about by rapid advances in technology. Just as pre-digital era case law could not foresee these developments, this Court also cannot know the numerous issues that will arise as technology continues to evolve. A broad and categorical rule will help to eliminate some of the uncertainty. A narrow rule would invite chaos.

To be sure, some courts, in considering cell phone searches incident to arrest, have focused on the particular features and capabilities of the type of cell

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of flashlights, low-flying helicopters, aerial photography, radio transmitters, electronic listening devices, infrared technologies, and information conveyed through a third party. Russell L. Weaver, *The Fourth Amendment, Privacy and Advancing Technologies*, 80 MISS. L.J. 1131, 1186-1221, 1227 (2011) ("today, more than three decades after *Katz* was decided, it is not clear that the Court's [reasonable expectation of privacy] test is providing [privacy] protections, or that the test is capable of doing so"). Professors MacLean and Lamparello suggest that perhaps now is the time for the Court to consider abandoning the "reasonable expectation of privacy" approach in favor of a "constitutional reasonableness" test, focused on the reasonableness of safeguarding the "persons, houses, papers, and effects" that officers choose to search and seize, and the reasonableness of the officers' actions in searching and seizing them, with or without a warrant.

phone before them. But this Court, issuing just 100 or so formal opinions per year, may not revisit the issues raised in *Riley* and *Wurie* for many years. Therefore, this decision must stand the test of time.

Professors MacLean and Lamparello suggest that the Court and society would be best served by decisions in *Riley* and *Wurie* that look beyond flip phones and iPhones. Perhaps denominating the rule as applicable to "digital storage devices,"[19] rather than to cell phones of this type or that, would be sufficient. Whatever rule is adopted, and whatever language employed, it should include a requirement that already has stood the test of time: reasonableness.

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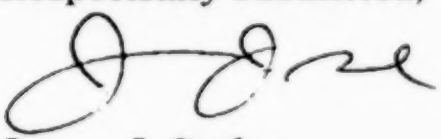
19 Digital storage devices, as used here, could include digital data storage instruments capable of storing substantial quantities of the types of "papers" and "effects" protected by the Fourth Amendment, including cell phones, smartphones, laptop computers, tablet computers, thumb drives, external storage devices, DVDs, and the like as those technologies expand in the future.

CONCLUSION

For these reasons, and those set forth by Petitioner, the judgment in *Riley v. California* should be reversed, and the judgment in *United States v. Wurie* should be affirmed with the modifications addressed herein.

Respectfully submitted,



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AMICUS CURIAE BRIEF

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Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

BRIMA WURIE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. NAFD has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.

NAFD has filed in this case because the indigent criminal defendants served by the organization's members—such as Mr. Wurie in this case—commonly face situations in which they are arrested with cellular telephones on their persons, and an overbroad extension of the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement would open the door to undue

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* made such a monetary contribution. Both parties have submitted blanket letters of consent to the filing of all *amicus* briefs with the Clerk of the Court pursuant to Rule 37.3.

infringements upon these individuals' right to security in their personal effects.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958.

NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges. NACDL provides *amicus* assistance on the federal and state level in cases that present issues of importance, such as the one presented here, to criminal defendants, criminal defense lawyers, and the proper and fair administration of criminal justice.

SUMMARY OF ARGUMENT

The First Circuit correctly held that owners of cell phones have a reasonable privacy interest in the data on their phones and that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement does not categorically authorize warrantless searches of cell phones. The United States' arguments in favor of warrantless searches incident to arrest—evidence destruction and officer safety—revolve around hypothetical actions by third parties. The search-incident-to-arrest exception, however, has always focused solely on the potential actions of the arrestee and responded solely to dangers inherent in each and every arrest.

The exigent circumstances exception to the warrant requirement is a better fit for addressing the United

States' concerns. Applying this doctrine to searches of cell phones will appropriately focus the inquiry on the circumstances of each case, including the speed with which a warrant can be obtained in the subject jurisdiction. Even putting aside this advantage, the bright-line rule proposed by the United States is unworkable because searches of digital information and media cannot be cabined in the manner the United States suggests.

Contrary to the United States' argument, *Smith* v. *Maryland*, 442 U.S. 735 (1979), does not support the warrantless search of cell phone call logs. A call log reveals a broad range of information, including the user's personal routines and the identity of his or her closest intimates. The bare list of dialed numbers at issue in *Smith* is not analogous. Moreover, the mechanical pen register in *Smith* had limited capabilities that ensured there would be no overreach by law enforcement into private information. By contrast, officers ostensibly trying to locate a cell phone's call log could "stumble upon" other information stored on the phone.

The United States is also incorrect in arguing that this Court's decisions in *Maryland* v. *King*, 133 S. Ct. 1958 (2013), and *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012), support its proposed rule. The decisions in *King* and *Florence* were animated by concerns not present in this case: the need to positively identify arrestees, and the practical necessities of operating safe and secure prisons. Because searching cell phones does not further these goals, *King* and *Florence* do not aid the United States.

ARGUMENT

I. THE FIRST CIRCUIT CORRECTLY HELD THAT THE SEARCH-INCIDENT-TO-ARREST EXCEPTION DOES NOT CATEGORICALLY AUTHORIZE WARRANTLESS CELL PHONE SEARCHES, BUT THAT THE EXIGENT CIRCUMSTANCES EXCEPTION CAN APPLY IN PARTICULAR CASES.

The First Circuit held that "warrantless cell phone data searches are *categorically* unlawful under the search-incident-to-arrest exception, given the government's failure to demonstrate that they are ever necessary to promote officer safety or prevent the destruction of evidence." Pet. App. 25a (emphasis in original). It further recognized, however, that "other exceptions" to the warrant requirement, particularly the exigent circumstances exception, can justify warrantless cell phone searches "under the right conditions." *Id.* at 28a. This approach is consistent with this Court's precedents and properly recognizes that the exigent circumstances exception provides the appropriate framework for analyzing any exigency-based concerns that arise in this context.

1. In *Chimel* v. *California*, this Court held that when an arrest is made, police can search the arrestee and the area within his immediate control in order to "remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and to prevent "concealment or destruction [of evidence]." 395 U.S. 752, 763 (1969). The United States contends that both of these "basic justifications" for the search-incident-to-arrest exception apply in the case of cell phones, U.S. Br. at 42, but it relies on arguments that have no basis in

this Court's decisions. If the Court accepts these arguments here for the first time, it would substantially expand this exception in ways that are untethered to its purposes.

The United States does not claim that cell phone searches are justified under *Chimel* because there is any risk that *arrestees* can use their cell phones to harm police officers or to destroy evidence that is stored on the phones. Nor could it: As Respondent in this case and *amici* in the *Riley* case have amply demonstrated, police officers can fully dissipate such risks by seizing cell phones[2] and removing them from arrestees' control. Instead, the United States claims that risks to police officers and to evidence stored on the phones are posed by the potential *actions of third parties*. See, *e.g.*, U.S. Br. at 37 (contending that an arrestee's "co-conspirators" might attempt to wipe the cell phone data from a remote location); *id.* at 41 (citing risks to officer safety from "confederates or family members" who might head to the scene).

Even assuming that such risks exist,[3] this Court has never held that the potential actions of third parties can serve as a justification for searching an arrestee incident to his arrest. Instead, the search-incident-to-arrest exception is narrowly focused on preventing detrimental actions by the arrestee at the time and place of his arrest. See, *e.g.*, *Chimel*, 395

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[2] Of course the seizure of the phone would have to be authorized under the search-incident-to-arrest exception, properly considering limiting cases like *Arizona* v. *Gant*, 556 U.S. 332 (2009).

[3] Numerous *amici* in the *Riley* case have demonstrated that police officers have established protocols and techniques for preventing remote wiping of cell phones. *See also* Br. Resp't at 32-34 (showing that the officer safety risk posited by the United States is "highly unlikely").

U.S. at 763 (police can search *an arrestee* and "the area into which an arrestee might reach in order to grab a weapon or evidentiary items . . . ."); *United States* v. *Robinson*, 414 U.S. 218, 234 (1973) (officer safety rationale is based "on the need to *disarm the suspect*" (emphasis added)); *United States* v. *Chadwick*, 433 U.S. 1, 14-15 (1977) (exception is based on the "potential dangers lurking in all custodial arrests" that "*the person arrested* may have a weapon or is about to destroy evidence." (emphasis added)), *abrogated by California* v. *Acevedo*, 500 U.S. 565 (1991); *Gant*, 556 U.S. at 339 (evidence destruction rationale is based on the need to "safeguard[] any evidence of the offense of arrest that *an arrestee* might conceal or destroy" (emphasis added)). As a result, this Court has held that the exception is inapplicable in circumstances where the arrestee can no longer take any actions to harm police officers or destroy evidence. *Chadwick*, 433 U.S. at 15 (search of seized footlocker was "no longer an incident of the arrest" because there was "no longer any danger that the arrestee might gain access" to the footlocker); *Gant*, 556 U.S. at 335, 351 (invalidating search of arrestee's car while he was handcuffed in police vehicle).

Thus, in the guise of asking this Court to hold that searches of cell phones are authorized under the search-incident-to-arrest exception, the United States is really asking this Court to expand the scope of the underlying justifications for the exception. With respect to *Chimel*'s evidence destruction rationale, the United States is asking this Court to hold that a search of an arrestee's cell phone is justified by the mere possibility that third parties will remotely destroy evidence on it. With respect to *Chimel*'s officer safety rationale, the United States does not

contend that a search of an arrestee's cell phone is justified by the possibility that third parties will render the phone dangerous to officers at the scene of the arrest; rather, it contends that officers "can mitigate the risk of danger from sudden arrivals . . . by reviewing the recent calls and text messages of an arrestee's cell phone." U.S. Br. at 41; *id.* at 42 (cell phone "may have information that will warn officers about an imminent dangerous encounter"). In other words, the United States does not contend that the danger to officer safety derives in any way from the cell phone itself. Instead, it contends that warrantless cell phones searches are justified because such searches would be a useful tool for police to combat a danger that they have always had to contend with.

2. This Court should decline to expand the scope of the search-incident-to-arrest exception to encompass the United States' theories. Based as they are on the potential actions of remotely-located confederates, these theories are far removed from the exception's purpose of neutralizing the "potential dangers lurking in *all* custodial arrests," namely, "that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed." *Chadwick*, 433 U.S. at 14-15 (emphasis added). Because arrestees' cell phones rarely implicate these concerns, the bright-line rule proposed by the United States improperly "diverge[s] from [the] purpose and rationale" of the search-incident-to-arrest exception. *Bailey* v. *United States*, 133 S. Ct. 1031, 1038 (2013). In all cases, "the scope of a search incident to arrest" must be "commensurate with its purposes of protecting arresting officers and safeguarding . . . evidence . . . ." *Gant*, 556 U.S. at 339.

The risk of remote cell phone wiping is hardly one that inherently "lurk[s] in all custodial arrests."

Indeed, the United States has not documented *any* instance of it actually occurring, much less that it is a pervasive risk that justifies blanket authority for police to conduct intrusive cell phone data searches. The absence of real-world examples is not surprising because the risk of remote wiping could only arise if (1) the arrestee has confederates; (2) these confederates are alerted that the arrestee has been taken into custody; and (3) the confederates have the means at hand to wipe the cell phone.[4] These multiple preconditions suggest that the risk of remote wiping arises only in rare cases, not the ordinary course. This conclusion is bolstered by the fact that the "vast majority" of arrests in this country are for alleged misdemeanors, including traffic offenses, for which the arrestee would not have any confederates, much less any reason to arrange for remote wiping in anticipation of a possible arrest. See Br. Pet'r at 2, *Riley* v. *California*, No. 13-132 (S. Ct. Mar. 3, 2014). Even in the case of Mr. Wurie's arrest for alleged drug offenses, there was no evidence that he had any confederates, much less that any third parties attempted to wipe his cell phone.

Because remote wiping is not commonly a danger in making arrests, much less always a danger, there is no justification for granting police blanket authority to conduct warrantless searches of all arrestees' cell phones. Such authority would only create a police

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[4] *See* Samuel J. H. Beutler, Note, *The New World of Mobile Communication: Redefining the Scope of Warrantless Cell Phone Searches Incident to Arrest*, 15 Vand. J. Ent. & Tech. L. 375, 394 (2013) (explaining that in order for remote wiping to be possible, "(1) a phone must be enabled with remote wipe capabilities, (2) an accomplice must have access to the remote wipe program, and (3) there must exist some way for the arrestee to contemporaneously alert the accomplice of the arrest.").

entitlement to indiscriminately rummage through highly private material in the course of the millions of arrests conducted each year.

The United States' officer safety argument is even further removed from the purposes of the search-incident-to-arrest exception, and also foreclosed by this Court's precedent. As noted, the United States does not contend that cell phones themselves pose any sort of danger to arresting officers; instead, its claim is that warrantless cell phone searches would be a useful tool for police because such searches would allow them to identify and anticipate potential threats from confederates who might arrive at the scene. Again, however, the United States has not shown that such threats from confederates arise with any frequency, or that they even arise at all in the ordinary course of arrests. Accordingly, the officer safety concern cannot justify the proposed blanket authorization of warrantless cell phone searches incident to arrest.

Moreover, whatever the usefulness of cell phone searches for monitoring the whereabouts or plans of confederates, this Court consistently has held that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978); see also *id.* ("the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 481 (1971) (the warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency."); *Bailey*, 133 S. Ct. at 1039-41 (limiting police authority to detain persons incident to execution of search warrant, despite discernible interests in protecting officers and

preventing escape). Thus, no matter how useful or convenient cell phone searches are to police in anticipating the movements of confederates, these law enforcement interests cannot justify dispensing with the warrant requirement in derogation of arrestees' vital Fourth Amendment rights.

For all of these reasons, the First Circuit correctly held that the Fourth Amendment does not permit warrantless cell phone searches to be undertaken as a routine incident of all arrests.

3. This is not to say that police can never conduct warrantless cell phone searches during arrests. As the First Circuit correctly recognized, the exigent circumstances exception is available "under the right conditions," such as "where the phone is believed to contain evidence necessary to locate a kidnapped child or to investigate a bombing plot or incident." Pet. App. 28a-29a. In addition, the exigent circumstances exception is available to address the officer safety and evidence destruction concerns that the United States relies on here—which are essentially exigency-based concerns. This Court consistently has recognized that "law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence," *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1559 (2013) (citing cases), or to "protect or preserve life or avoid serious injury," *Mincey*, 437 U.S. at 392 (quoting *Wayne* v. *United States*, 318 F.2d 205, 212 (D.C. Cir. 1963) (Burger, J., opinion)).

Therefore, in a particular case where police have a reasonable basis to apprehend an imminent risk that third-party confederates will wipe an arrestee's cell phone, or that confederates will arrive at the scene of the arrest and threaten officer safety, the exigent circumstances exception can justify a warrantless

search of the cell phone. Exigency, however, is always a case-specific inquiry based on "the totality of circumstances." *McNeely*, 133 S. Ct. at 1559; *id.* (courts must "evaluate each case of alleged exigency based 'on its own facts and circumstances'" (quoting *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931))). Although this case-by-case approach provides police with less certainty than a bright-line rule, a bright-line rule is not suitable for the "exigencies" that the United States relies on. These concerns do not arise with any frequency, and their largely hypothetical character renders them insufficient to outweigh the significant privacy interest in the contents of cell phones. See *id.* at 1564 ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake."); see also *Amici* Br. ACLU et al. at 5-9, *Riley* v. *California*, No. 13-132 (S. Ct. Mar. 7, 2014) (highlighting the significant privacy interest owners have in their cell phone data); *Amici* Br. Center for Democracy & Technology and Electronic Frontier Foundation at 5-13, *Riley* v. *California*, No. 13-132 & *United States* v. *Wurie*, No. 13-212 (S. Ct. Mar. 10, 2014) (same); *Amici* Br. Electronic Privacy Information Center et al. at 6-32, *Riley* v. *California*, No. 13-132 (S. Ct. Mar. 10, 2014) (same).

In addition, case-by-case treatment is appropriate in a context, such as this one, where the technology is rapidly changing. In the coming years, remote-wiping techniques may evolve and improve, but so may law enforcement techniques that combat remote wiping. Given this fluid situation, analyzing any issues that arise with respect to remote wiping under a case-by-

case approach ensures that the judiciary does not commit "error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *City of Ontario* v. *Quon*, 560 U.S. 746, 759 (2010).

Moreover, analyzing exigency-based justifications under the exigent circumstances exception allows for consideration of a factor that the United States largely ignores: the speed with which warrants can now be obtained in many jurisdictions. In *McNeely*, this Court recognized that "telecommunications innovations" have significantly "streamline[d] the warrant process" in many jurisdictions. 133 S. Ct. at 1562-63. "Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing." *Id.* at 1562 & n.4 (listing jurisdictions); see also *id.* at 1572-73 (describing expedited procedures used by various states and noting that judges in some jurisdictions "have been known to issue warrants in as little as five minutes," or "in less than 15 minutes.") (Roberts, C.J., concurring in part and dissenting in part). This trend will only continue as "future technological developments" further expedite the warrant process. *Id.* at 1563.

As this Court held in *McNeely*, expedited procedures like these are "relevant to an assessment of exigency." *Id.* Even in those rare situations where police do have reason to fear that confederates might attempt to wipe the arrestee's cell phone, police should be required to obtain a warrant if they can reasonably do so before any likelihood of confederates learning of the arrest and taking action in response arises.

Here, of course, the police had no reason to apprehend that confederates might attempt to wipe Mr. Wurie's cell phone, and the United States did not argue below that the exigent circumstances exception applied. See Pet. App. 1a. This admitted lack of exigency confirms that the search of Mr. Wurie's cell phone was not "commensurate" with any purpose served by the search-incident-to-arrest exception to the warrant requirement.

II. *SMITH* v. *MARYLAND* DOES NOT SUPPORT A RULE ALLOWING CALL LOGS TO BE SEARCHED INCIDENT TO ARREST.

Recognizing the vulnerabilities in its position that police should have blanket authority to conduct warrantless searches of cell phones incident to arrest, the United States alternatively argues that police should be able to conduct searches that are limited in scope. For example, it advocates a bright-line rule allowing police to search all cell phone call logs incident to arrest, U.S. Br. at 54-55, on the view that *Smith* v. *Maryland* establishes that individuals "have no reasonable expectation of privacy" in call logs. U.S. Br. at 54-55. *Smith*, however, hardly stands for that proposition and, indeed, precludes the result that the United States seeks here. In any event, the United States' proposed bright-line rule is unworkable and would invite police to conduct evidentiary fishing expeditions on arrestees' cell phones.

1. The information on cell phone call logs cannot remotely be analogized to the limited information that the police in *Smith* derived from the use of a "pen register," a "mechanical device that record[ed] the numbers dialed" by monitoring the electrical impulses transmitted by a rotary telephone. 442 U.S. at 736 n.1 (quoting *United States* v. *New York Tel.*

Co., 434 U.S. 159, 161 n.1 (1977)). This Court held that because the caller had "voluntarily conveyed" the numbers dialed to the telephone company (by sending electronic impulses over the telephone lines), the caller had no legitimate expectation of privacy in those numbers and thus recording them was not subject to Fourth Amendment protection. *Id.* at 742-45.

Cell phone call logs contain much more information in which owners have a privacy interest than merely numbers dialed. The Court in *Smith* was careful to note that the pen register "does not overhear oral communications and does not indicate whether calls are actually completed." 442 U.S. at 736 n.1 (quoting *New York Tel. Co.*, 434 U.S. at 161 n.1). A cell phone call log, on the other hand, conveys a wealth of information that will only increase as technology advances. Not only do call logs record whether calls were completed, they also record incoming calls, missed calls, the duration of calls, and the time of calls. They disclose the names assigned different contacts by the phone's user. And they provide information about the relative importance of callers to the phone user, based on whether they appear on a speed dial, friend list, or call circle, or just by virtue of the number of communications.

Nicknames and even the spellings of names on the call log can convey private information. In *Riley*, the companion case to *Wurie*, the police noted that the defendant used "CK" in spelling words that usually begin in "k". From that spelling, the police surmised that the defendant was a gang member because "CK" can mean "Crip Killers," which is slang for members of the Bloods gang. Br. Pet'r at 5, *Riley*, No. 13-132. The nicknames that cell phone owners assign to particular contacts can convey a close or intimate

relationship (*e.g.*, "mom," "dad," "boyfriend"), or even medical or mental health information, as by use of a "Dr." prefix or the name of a hotline. Such nicknames can also reveal political affiliations, religious affiliations, and memberships in advocacy groups. Moreover, the frequency of communications, their duration, and the time when they take place can reveal much about the relationship between the phone's user and any given contact. Patterns of communication can also reveal the user's routines and idiosyncrasies, such as his or her ordinary waking hours, work hours, and even diet. The United States' attempt to analogize the exploration of a call log to the use of a pen register to review dialed numbers is thus woefully inapt.

Call logs are also dynamic and continue to record information after the arrest, which makes the search-incident-to-arrest exception an uncomfortable fit. The search-incident-to-arrest exception is justified by officer safety and the need to prevent the destruction of evidence *at the time of arrest*. *Chimel*, 395 U.S. at 763 (police can search an arrestee and "the area into which an arrestee might reach in order to grab a weapon or evidentiary items . . . ."); *Robinson*, 414 U.S. at 234 (officer safety rationale is based "on the need to disarm the suspect"). Allowing police to gather information created *after* the arrest would be an unprecedented expansion of existing doctrine.

The search in this case illustrates that call log searches intrude into the arrestee's privacy far more than the officers intruded in *Smith*. Here, the officers seized Mr. Wurie's phone and, upon opening it, viewed a photograph of a young black woman holding a baby as the phone's wallpaper. Pet. App. 2a-3a. The officers pressed one button on the phone that took them to the call log which indicated incoming calls

from "my house" and pressed one more button to determine the actual number associated with that label. *Id.* Unlike in *Smith*, none of this information was voluntarily conveyed by Mr. Wurie to the telephone company. Created by Mr. Wurie for his own personal use, these digital contents implicate much stronger privacy interests than a bare list of numbers dialed from a rotary phone.

2. Even if the bright-line rule proposed by the United States were legally supportable, it is unworkable and by no means limits the discretion of the police or their access to information on cell phones. While different circuits apply the "plain view" doctrine differently in regard to digital information, there is a considerable amount of information that police can "view" when navigating to a cell phone call log.

In *Smith*, a bright-line rule was possible because the officers only had access to the numbers dialed. *Smith*, 442 U.S. at 737. The very nature of the technology eliminated any concerns about overreach by the police into private information. The Court stressed the limited nature of the intrusion, stating that a pen register does not enable police to "overhear oral communications and does not indicate whether calls are actually completed." *Id.* at 736 n.1 (quoting *New York Tel. Co.*, 434 U.S. at 161 n.1). In the cell phone context, no such technological limitations can cabin police discretion.

The sheer number of different kinds of cell phones, each with their own graphical interfaces, menus, and functionality, makes it much more likely that police will "stumble upon" (either intentionally or inadvertently) additional information while ostensibly trying to navigate to call logs. A "bright-line" rule that depends upon police developing

familiarity with multiple and varied technological devices is no bright-line rule at all.

Compounding the problem, there will undoubtedly be confusion about what constitutes a "search" of a call log, since the United States offers no definition or description. See U.S. Br. at 54 (arguing that police can "search *areas of the phone* for which individuals have no reasonable expectation of privacy—in particular, call logs" (emphasis added)). Can the police click on the number in the call log? Where will clicking on that number take the police? To the contacts list? To a text message and call history screen? To linked pictures to the contact? Allowing police to "search" call logs can easily expand into allowing them to search contact lists, text messages, voice messages, and even photos.

Were police entitled as a categorical matter to access and review call logs, the private information "stumbled upon" might well be admissible under the plain view doctrine. See *Coolidge*, 403 U.S. at 465. The volume of information that could thus be swept in is staggering—and a problem for which there was no analogue in *Smith*.

Case law from the area of computer searches, including searches conducted pursuant to warrants, is replete with examples of law enforcement officers applying the plain view exception to seize evidence of crimes other than the ones they were initially investigating. For example, in *United States* v. *Gray*, 78 F. Supp. 2d 524 (E.D. Va. 1999), law enforcement agents were searching a computer for evidence of "unlawfully accessing a government computer," and stumbled upon images of child pornography that the court found to be admissible under the plain view doctrine. *Id.* at 525-29; see also *United States* v. *Stabile*, 633 F.3d 219, 242 (3d Cir. 2011) (declining to

suppress video files with "lurid names" discovered by officer in warranted search for financial information); *United States* v. *Williams*, 592 F.3d 511, 522 (4th Cir. 2010) ("And so, in this case, any child pornography viewed on the computer or electronic media may be seized under the plain-view exception."); *United States* v. *Giberson*, 527 F.3d 882, 884 (9th Cir. 2008) (refusing to suppress evidence of child pornography found on a personal computer during a search for financial information to collect child support); *United States* v. *Adjani*, 452 F.3d 1140, 1150 (9th Cir. 2006) (rejecting the defendant's claim that emails seized were outside the scope of the warrant because they implicated her in another crime not covered by the search warrant); *United States* v. *Wong*, 334 F.3d 831, 838 (9th Cir. 2003) (applying the plain view doctrine to the discovery of child pornography on a computer in the course of a murder investigation); *State* v. *Mays*, 829 N.E.2d 773, 779 (Ohio Ct. App. 2005) (holding that an officer's observation of the words "he will die today" on defendant's computer screen while lawfully present in defendant's home fell within the ambit of the plain view doctrine); *Commonwealth* v. *Hinds*, 768 N.E.2d 1067, 1073 (Mass. 2002) (holding that the officer "was not obligated to disregard files listed in plain view on the 'Chuck' directory whose titles suggested contents that were contraband.").

Searches of digital information and media create special problems for the plain view doctrine that are best addressed through requiring police to obtain specific warrants. Courts have struggled with how to cabin searches of digital information even in the warrant context, but have begun to develop useful guidance. See, *e.g.*, *United States* v. *Mann*, 592 F.3d 779, 786 (7th Cir. 2010) ("counsel[ing] officers and

others involved in searches of digital media to exercise caution to ensure that warrants describe with particularity the things to be seized and that searches are narrowly tailored to uncover only those things described."); *United States* v. *Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1179-80 (9th Cir. 2010) (Kozinski, C.J., concurring) (providing detailed guidance to judges and prosecutors about search warrant requirements for digital media and the plain view doctrine). The daunting complexities that lie ahead demand close attention from neutral magistrates and ultimately appellate courts, not circumvention by officers "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948).

3. The United States' reliance on *Smith* is a classic example of a form of reasoning that this Court has cautioned against and rightfully rejected: the wooden application of Fourth Amendment principles and precedents to new technologies. In *United States* v. *Jones*, 132 S. Ct. 945 (2012), for example, this Court rejected the argument that the police could attach a GPS device to a vehicle without a warrant. The United States had argued that the exterior of a car is "thrust into the public eye, and thus to examine it does not constitute a 'search.'" *Id.* at 952 (citation omitted). The Court was not persuaded that a GPS device could be used to continuously monitor a vehicle's location, even though the same information could be obtained through conventional visual monitoring of the vehicle's location by officers. As Justice Sotomayor noted, "[t]he net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may

'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.* at 956 (Sotomayor, J., concurring) (quoting *United States* v. *Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

Similarly, in *Kyllo* v. *United States*, this Court rejected "a mechanical interpretation of the Fourth Amendment" because the alternative "would leave the homeowner at the mercy of advancing technology . . . ." 533 U.S. 27, 35 (2001). There, the United States had argued that it could use thermal imaging to detect heat emissions from a house without a warrant. While the dissent argued that any member of the public could detect heat emanations from a home based on observing water evaporation rates or snow melt rates, *id.* at 43 (Stevens, J., dissenting), the majority held that using thermal imaging was a search because the thermal imager allowed the police to "explore details of the home that would previously have been unknowable without physical intrusion," *id.* at 40 (majority opinion).

As *Jones* and *Kyllo* demonstrate, particular care must be taken not to let technological developments rob the Fourth Amendment of relevance. Extending *Smith* to cell phone call logs would do just that. As one judge noted in an analogous context, "the surveillance program now before me is so different from a simple pen register that *Smith* is of little value in assessing whether the Bulk Telephony Metadata Program constitutes a Fourth Amendment search. To the contrary . . . I believe that bulk telephony metadata collection and analysis almost certainly does violate a reasonable expectation of privacy." *Klayman* v. *Obama*, No. 13-0881, 2013 WL 6598728, at *19 (D.D.C. Dec. 16, 2013). As in *Klayman*, the pen register example is of little value in

assessing the privacy concerns implicated in searching cell phone call logs.

III. *MARYLAND* v. *KING* AND *FLORENCE* v. *BOARD OF CHOSEN FREEHOLDERS* DO NOT SUPPORT WARRANTLESS CELL PHONE SEARCHES INCIDENT TO ARREST.

The United States relies on *Maryland* v. *King*, and *Florence* v. *Bd. of Chosen Freeholders*,[5] to argue that warrantless cell phone searches are permitted incident to arrest because they "serve the time-sensitive law-enforcement interest in determining or confirming the identity of an arrestee." U.S. Br. 32-33. Relatedly, it relies on these decisions to argue that even if unlimited cell phone searches are unreasonable, "officers should always be permitted to conduct a quick search of a cell phone to confirm a suspect's identity." *Id.* at 52-53. The United States' reliance on these decisions is misguided. It ignores the limited scope of this Court's holdings in those cases and the fact that the Court's actual reasoning compels the rejection of its position in the much different context presented here.

1. The United States principally relies upon *King*, in which this Court upheld Maryland's law authorizing police to collect DNA evidence via cheek swabs from arrestees charged with crimes of violence and other serious crimes. 133 S. Ct. 1958. This Court reasoned that the collection of DNA evidence was justified by law enforcement agencies' "legitimate government interest" in "identify[ing] the persons . . . they must take into custody," *id.* at 1970, and noted that DNA testing provides "an irrefutable

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[5] *Amici* do not endorse the holdings in *King* or *Florence* and filed *amicus* briefs arguing for different outcomes.

identification," *id.* at 1972. See also *id.* (noting "the unparalleled accuracy DNA provides."). In balancing these law enforcement interests against the "privacy-related" interests of the arrestee, *id.* at 1970, the Court concluded that "the intrusion of a cheek swab to obtain a DNA sample is a minimal one," *id.* at 1977. This is true both because the cheek swab is a "gentle process" that amounts to a "negligible" intrusion, *id.* at 1969, and because the Maryland statute only authorized police to collect and analyze the DNA "for the sole purpose" of ascertaining the arrestee's identity, prohibiting DNA testing that revealed other information, such as the arrestee's "genetic traits" or "private medical information," *id.* at 1979-80.

King does not remotely justify the search of Mr. Wurie's cell phone, much less a categorical rule that cell phones can be searched in order to ascertain arrestees' identities. As an initial matter, the United States' suggestion that the cell phone search at issue enabled police to identify Mr. Wurie does not comport with the facts. See U.S. Br. 32-33. Nothing in the record suggests that there was any uncertainty about Mr. Wurie's identity prior to the search of his cell phone. Police have ample means at their disposal to confirm the identity of arrestees as part of the booking process (*e.g.*, by checking ID's or taking fingerprints), and there is no indication that these means were not conclusive in Mr. Wurie's case. In any event, as the United States acknowledges, the police searched Mr. Wurie's cell phone in order to determine his home phone number and then his place of residence so that they could investigate whether additional contraband would be found at the address, *id.* at 33, not in order to determine his name or identity. In fact, the cell phone search proved

unhelpful in confirming Mr. Wurie's identity: when police cross-referenced the "my house" number with a public online database, the database did not return the name of Mr. Wurie but someone else. Pet. App. 3a (Manny Cristal).

As this case demonstrates, the United States' assertion that "[c]ell phones are particularly useful in identifying an arrestee," U.S. Br. at 32, is anything but self-evident. The United States asserts that a cell phone is "likely" to contain information "indicating" its possessor's real name, "such as text or email messages," *id.*, but this is hardly true in every case. It depends, among other things, on what information an owner chooses to store on the phone, how they label it, what usernames they adopt, and how formally they communicate when using various modes of interaction. In short, the varied contents of cell phones are a far cry from DNA swabs and the "irrefutable identification" they yield. *King*, 133 S. Ct. at 1972.

Indeed, if anything, *King* forecloses the United States' argument. As noted, this Court upheld the DNA swabs in *King* because it found that Maryland's collection of DNA evidence "did not intrude on [arrestees'] privacy in a way that would make his DNA identification unconstitutional." *Id.* at 1979. This was because the procedure was carefully defined and limited by a statute that barred use of samples to index anything apart from "junk" DNA with no known link to genetically identifiable characteristics. *Id.* at 1979-80. By stark contrast, the cell phone searches that the United States advocates here intrude on individuals' fundamental privacy interests. And of course an officer could "stumble upon" all sorts of highly personal information in the course of an ostensible search for "identity"

information. For these reasons, the United States' suggestion that police could conduct "quick" or limited searches to confirm identity "without a close examination of any particularly personal content" is pure fantasy. See U.S. Br. at 52.

In short, *King* provides no authority for the United States' position.

2. *Florence* is even further removed from the issues in this case. In *Florence*, this Court held that correctional officials may subject all detainees who will be admitted to the general prison population to "undergo a close visual inspection while undressed." 132 S. Ct. at 1513. In reaching this conclusion, the Court considered whether the search procedures "struck a reasonable balance between inmate privacy and the needs of the institutions." *Id.* at 1523. It concluded that the searches were justified under this balancing test because "[c]orrectional officials have a significant interest in conducting a thorough search as a standard part of the intake process," *id.* at 1518, in order to discover and "deter the smuggling of weapons, drugs, and other prohibited items inside," *id.* at 1516. Correctional officers also have a legitimate interest in visually inspecting inmates for "certain tattoos and other signs of gang affiliation," as "[t]he identification and isolation of gang members before they are admitted protects everyone in the facility." *Id.* at 1518-19. Given the utility of physical inspections as a means of minimizing potential "danger[s] to everyone in the facility," *id.* at 1522, the government's interest outweighed the privacy interests of persons about to be admitted to a general prison population under conditions affording substantial contact with other detainees, *id.* at 1522-23.

The United States argues that warrantless cell phone searches are permissible because they also can assist police in determining gang affiliation, yet are "comparatively less intrusive" than the visual body searches that this Court upheld in *Florence*. U.S. Br. at 33; *id.* at 52 (noting that this Court "approved exceptionally intrusive searches designed to determine gang affiliation" in *Florence*). This argument is flawed in multiple respects. As an initial matter, the United States' premise that searching personal cell phone data is *per se* less intrusive than visual strip searches is debatable. In any event, the United States ignores that this Court's holding in *Florence* was animated by the unique and serious problems that arise in the context of prison administration—a special area that this Court has identified as meriting a high degree of judicial restraint. See *Florence*, 132 S. Ct. at 1515 ("Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face."); *Turner* v. *Safley*, 482 U.S. 78, 84-85 (1987) ("Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint."); *Bell* v. *Wolfish*, 441 U.S. 520, 547-48 (1979). *Florence* is simply inapposite, and certainly does not authorize a blanket rule permitting cell phone searches for all arrestees.

CONCLUSION

For these reasons, and those set forth in Respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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v.
STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the California Court of Appeal, Fourth District

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UNITED STATES,
Petitioner,
v.
BRIMA WURIE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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I

INTEREST OF *AMICI CURIAE*[1]

Much is at stake in this Court's review of whether the Fourth Amendment permits police officers to search the digital contents of an arrestee's cell phone incident to arrest. The warrantless search of a cell phone affects not only an individual's rights under the Fourth Amendment, but necessarily implicates First and Fifth Amendment rights as well. These intertwined constitutional protections are of particular concern to *Amici* – news organizations whose members use modern technology to record, document, and report events. Because of the many ways that journalists and others use cell phone technology, these cases go the heart of the concerns that led the Constitution's Framers to adopt not only the Fourth Amendment, but also protections for freedom of expression and against self-incrimination.

Amici's members use new communications technologies, including smart phones, as an integral part of their journalistic endeavors. Coverage of breaking news frequently involves contact with police, and journalists have been threatened, arrested, and sometimes charged for doing nothing more than engaging in newsgathering activities. The same has happened to private individuals who use cell phones to record and document newsworthy

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[1]All parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

events, as advanced technology has made citizen reporting more ubiquitous.

Amici, as described in Appendix A, are fourteen of the nation's leading news organizations, including The National Press Photographers Association, The Reporters Committee for Freedom of the Press, Advance Publications, Inc., the American Society of Media Photographers, the American Society of News Editors, the Association of Alternative News Media, The E.W. Scripps Company, the Investigative Reporting Workshop at American University, The Media Consortium, the Media Law Resource Center, The New York Times Company, the Newspaper Association of America, the Online News Association, and the Student Press Law Center. *Amici's* interest in these cases is to ensure that the crucial role that journalists, members of the press, and citizen reporters play in promoting discussion of matters of public concern is not diminished.

BACKGROUND

These cases involve criminal convictions secured with the help of information obtained from defendants' cellular phones, the contents of which were searched incident to their respective arrests. In neither *Riley* nor *Wurie* were warrants secured or any other step taken to treat the phones differently from any other personal property collected in the course of effectuating arrests.

1. When a traffic-stop inventory search of Riley's car revealed firearms under the hood, Riley was arrested. Riley Pet. Br. 4. Upon his arrest, the police seized his cell phone. The phone was a touch-

screen device that could store voice and text messages, as well as photos and video, and could be used to access the Internet, among other functions.

Police made two separate warrantless searches of the phone. At the scene of the arrest, an officer scrolled through its contents – including the contact list and text messages – and found initials suggesting street-gang association. Hours later at a police station, a detective searched "a lot of stuff" on the phone "looking for evidence," Riley JA 11, 20, and found photos and videos also suggestive of gang affiliation.

Based on this and other evidence, Riley and two others were charged with various offenses, including an allegation that their crimes were gang-related. Riley moved to suppress all evidence obtained during the searches of his cell phone, arguing they violated the Fourth Amendment given the absence of a warrant or any exigency justifying a search. *Id.* 269-70. The court denied the motion on grounds the phone searches were permissible incident to arrest. Riley Br. 7.

Riley's initial trial ended in a hung jury, but on retrial, the State relied on circumstantial evidence, including a photo and video gathered from the cell phone search. Riley was convicted and sentenced to a term of 15 years to life.

2. Wurie was seen by police making from his car an apparent drug sale that the officers believed had been arranged by cell phone. App. 2a, 56a. Officers following Wurie arrested him for drug distribution, brought him to a police station, and seized from him

two cell phones, along with other personal property. *Id.* at 2a, 57a.

Officers noticed that one of the cell phones, a "flip" model that must be opened to make calls, kept receiving calls from a number identified on the phone's external screen as "my house." *Id.* 2a. Officers opened the phone to view its call log, *id.* 2a-3a, and saw a photo of a woman holding a baby, *id.* 3a, then used the phone's navigation buttons to access the call log and obtain the number for "my house." *Id.* The police learned via an online directory that the phone number for "my house" corresponded to an address near where Wurie had parked before his arrest. App. 3a. Officers went to the address, identified a mailbox with Wurie's name, and through the window saw a woman resembling the photo on his phone. App. 3a-4a. Police obtained a search warrant for the premises, and there found cash, drugs, drug paraphernalia, a firearm, and ammunition. *Id.* 4a.

Wurie was charged based on evidence collected from his phone and the apartment, and the district court denied his motion to suppress. The jury convicted him, and Wurie was sentenced to over 20 years in prison.

3. Despite the commonality of Riley's and Wurie's respective convictions and sentences being supported by evidence obtained through warrantless searches of their cell phones, the decisions on review reached opposite conclusions regarding the constitutionality of the searches. In *Riley*, the California Court of Appeal affirmed the conviction, holding the cell phone searches were permissible incident to arrest,

because Riley's cell phone was "immediately associated with [his] person" at the time of arrest. Pet. App. 15a. In doing so, it relied on a California Supreme Court decision, *People v. Diaz*, 51 Cal. 4th 84 (2011), which held such cell phone searches are permissible regardless of whether an exigency for the search exists. Pet. App. 15a. The California Supreme Court denied without comment Riley's petition for discretionary review. *Id.* 24a.

In *Wurie*, the U.S. Court of Appeals for the First Circuit reversed the conviction and remanded for further proceedings. 728 F.3d at 1, 14. It held that warrantless searches of data on cell phones seized from arrestees as part of an arrest categorically exceed the bounds of the Fourth Amendment search-incident-to-arrest exception. *Id.* at 1, 12. This is so, the court reasoned, because the government failed to demonstrate that such searches are ever necessary to promote officer safety or prevent the destruction of evidence, the two bases on which the exception rests. *Id.* at 5-6, 9, 12.

Although the cases were not formally consolidated, the questions they present involve issues of surpassing importance that will determine the future robustness of numerous constitutional protections.

SUMMARY OF ARGUMENT

Neither Riley nor Wurie are reporters, nor were they using their cell phones as tools to facilitate reporting information to the public. But the fact that they were convicted based in part on words and images stored in personal electronic devices

implicates the fundamental purposes underlying not just the Fourth Amendment, but the First and Fifth Amendments as well.

Fourth Amendment analysis must account for technological change, as this Court has endeavored to ensure that "[w]hatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment." *United States v. Jones*, 132 S. Ct. 945, 951 n.3 (2012). The Constitution's Framers also understood that "the unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

The Framers adopted strong protections against searches or seizures of persons, houses, papers, and effects so that the government could not engage in fishing expeditions to find seditious writings that could be used to incriminate citizens and thereby stifle free expression. These fundamental rights are vital for all citizens, including the defendants in these cases. But they have particular importance for photographers, journalists, and others who regularly use modern communications technologies to gather and report the news. Allowing warrantless searches of cell phones would have a particularly adverse impact on the press.

It is essential for the Court to make clear that a search warrant is required in cases like these to prevent changing technology from eroding our most basic rights.

ARGUMENT

I. WARRANTLESS SEARCHES OF CELL PHONES THREATEN TO UNDERMINE THE INTERRELATED RIGHTS OF FREEDOM FROM UNREASONABLE SEARCHES, FREE EXPRESSION, AND FREEDOM FROM SELF-INCRIMINATION

A. Cell Phones Are Essential Tools of Self-Expression and Modern Journalism

Smart phones have become an integral part of modern newsgathering technology. A typical journalist's phone contains a wealth of private data, which can include a list of personal and professional contacts, people recently called (including news sources), text messages, email, GPS location data, web browsing history, passwords, and the contents of social media accounts. In addition, journalists use smart phones to take photographs, record video, record audio, and maintain reporting notes. Thus, at any time a journalist's phone may include drafts of stories, interviews, corresponding photos or video, information about sources, and other confidential information necessary for reporting.

Of particular concern to *Amici*, media outlets increasingly rely on issuing reporters smart phones to take photographs and to record other story elements. Cell phone cameras are capable of taking high quality photographs and audio-visual recordings. And, because smart phones can connect to the Internet, it is easy for journalists to upload

photo, video, audio, or text files to the Internet to file reports. Unfortunately, the availability of smart phone photographic technology also has led to the loss of staff positions by long-time photojournalists from newspapers and television stations.[2] But whatever else this may say about the current state of the news business, the increased reliance by media organizations on such technology only heightens the importance of the issues raised by these cases.

These new technologies have greatly expanded the ability to gather and report news, but the same capabilities that make them a boon to journalists create a grave threat if they are subject to unrestricted warrantless searches incident to arrest. Unfortunately, the threat is not just hypothetical, and the enhanced newsgathering capacity may have made reporters more frequent targets of police action. There has been an epidemic of arrests for nothing more than the journalistic enterprise of photographing public events.[3] Frequently, such

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[2] *See, e.g.*, Tim Worstall, This Might Not Work: Chicago Sun Times Fires All Its Photographers To Replace Them With iPhones, Forbes, June 3, 2013, http://www.forbes.com/sites/timworstall/2013/06/03/this-might-not-work-chicago-sun-times-fires-all-its-photographers-to-replace-them-with-iphones/; Georgia newspaper chain closes its photo department, tells reporters to take pictures, July 12, 2013, http://jimromenesko.com/2013/07/12/georgia-newspaper-chain-closes-its-photo-department-tells-reporters-to-take-pictures/.

[3] *See, e.g.*, Wills Citty, NYPD Officer Indicted After Investigation of NPPA Member's Unlawful Arrest, Aug. 28, 2013, http://blogs.nppa.org/advocacy/2013/08/28/nypd-officer-indicted-after-investigation-of-nppa-members-unlawful-arrest/; Steve Myers, News photographer arrested on Long Island for

arrests are made on generalized charges of "disorderly conduct" or "disturbing the peace," and often charges are dismissed without further action. But such circumstances could be used, and in some cases have been used, as a predicate to search or seize photographic equipment.

For example, two online journalists were arrested and removed from a public meeting of the Washington D.C. Taxicab Commission in 2012 for taking photographs (including video of the arrest of the first of the two reporters).[4] Both were charged

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videotaping police, Aug. 2, 2011, http://www.poynter.org/latest-news/mediawire/141291/news-photographer-arrested-on-long-island-for-videotaping-police/; Photographers arrested during rioting, imprisoned overnight, Aug. 24, 1998 http://www.rcfp.org/browse-media-law-resources/news/photographers-arrested-during-rioting-imprisoned-overnight; Mayor apologizes to photographer for arrest at football game, Aug. 24, 1998, http://www.rcfp.org/browse-media-law-resources/news/mayor-apologizes-photographer-arrest-football-game; Charges dropped against photographers arrested in Idaho and New Mexico, Sept. 25, 1995, http://www.rcfp.org/browse-media-law-resources/news/charges-dropped-against-photographers-arrested-idaho-and-new-mexico; Police launch investigation after wrongful arrest of editor, photographer, Aug. 14, 1985, http://www.rcfp.org/ browse-media-law-resources/news/police-launch-investigation-after-wrongful-arrest-editor-photographe; Times Photographer Is Arrested on Assignment, N.Y. Times, Aug. 5, 2012, available at 2012 WLNR 16502285; Henry K. Lee, UC pays to settle photographer's suit over arrest, July 2, 2012, http://www.sfgate.com/bayarea/article/UC-pays-to-settle-photographers-suit-over-arrest-3679859.php.

[4] *See, e.g.*, Tom Sherwood, Journalists Handcuffed, Removed From Taxi Commission Meeting, June 23, 2011, http://www.nbcwashington.com/news/politics/Journalists-Handcuffed-Removed-From-Taxi-Commission-Meeting-124384719.

with disorderly conduct and "unlawful entry/remaining" by U.S. Park Police, but the government did not press charges. If the police had sought to use the search-incident-to-arrest exception in that case, it could have conducted a generalized search of the journalists' cameras and electronic notes.[5]

Similarly, a photojournalist for the *Detroit Free Press* was arrested and her camera seized while covering a police action in July 2013. At the arrest scene, the reporter captured video on her newspaper-issued iPhone. Wright was held in police custody before being released without being charged. Police returned her smartphone, but with the memory card missing. However, the video she shot of the incident, which showed Wright identifying herself as a newspaper photographer before an officer grabbed

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html. Charges were dismissed almost immediately after the actions were widely criticized in the press. *See* Mark Seagraves, Journalists won't face charges, June 24, 2011, http://www.wjla.com/articles/2011/06/journalists-won-t-face-charges-62814.html.

[5] The Privacy Protection Act of 1980 makes it illegal for government officials to search for documents and materials that are intended for publication. 42 U.S.C. § 20000aa(b). The Act, however, contains a "suspect exception," and its restrictions on searches generally do not apply where "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate." Thus, notwithstanding the scope of the Act, if the holding in *Riley* is affirmed, journalists subjected to warrantless searches and seizures could be deprived of First and Fourth Amendment protections.

for the phone, was preserved in the camera's internal memory.[6]

Mistreatment of members of the news media by police during various Occupy Wall Street protests well illustrates this problem. Many media advocates, including *Amici*, reported numerous instances where news reporters and photojournalists were arrested along with protesters, merely for attempting to cover the events.[7] During a one-year period beginning in September 2011, more than 90 journalists were arrested in 12 U.S. cities while covering Occupy protests. *See* Josh Stearns, Tracking Journalist Arrests at Occupy Protests Around the Country, http://storify.com/jcstearns/tracking-journalist-arrests-during -the-occupy-prot (last visited Mar. 6, 2014). To allow warrantless searches of journalists' cell phones incident to such arrests raises obvious constitutional concerns.

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[6] *See* Jim Schaefer, No charges for Detroit Free Press photographer or police officer after cell-phone seizure and arrest, Aug. 24, 2013, http://www.freep.com/article/20130823/NEWS01/308230111/detroit/free/press-photographer-mandi-wright-officer-Lamar-Penn; David Becker, Detroit Newspaper Photographer Arrested While Covering Police Action, July 16, 2013, http://petapixel.com/2013/07/16/detroit-newspaper-photographer-arrested-while-covering-police-action/.

[7] *See, e.g.*, Sara Rafsky, Protest Puts Coverage in Spotlight, N.Y. Times, Nov. 21, 2011, available at 2011 WLNR 24091906; At Occupy protests, U.S. journalists arrested, assaulted, Nov. 11, 2011, http://www.cpj.org/blog/2011/11/at-occupy-protests-us-journalists-arrested-assault.php; Josh Stearns, Citizen Journalist Arrests on the Rise at Occupy Protests, Jan. 10, 2012, http://www.freepress.net/blog/12/01/10/citizen-journalist-arrests-rise-occupy-protests.

In addition to issues facing the institutional press, the general proliferation of smart phone use by individuals to capture news events in photos and video has generated an exponential increase in "citizen journalism." Members of the public increasingly are "playing an active role in the process of collecting, reporting, analyzing and disseminating news and information."[8]

In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), for example, a citizen was arrested after using his cell phone to photograph Boston police officers he believed were using excessive force in effectuating an arrest. Charges against him were later dropped, and Glik filed a civil action against the Boston police. In denying the individual officers' claim of qualified immunity, the First Circuit observed, "[t]he proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper." *Id.* at 84.

Likewise, in *Sharp v. Baltimore City Police*, No. 1:11-cv-02888-CCB (D. Md.), a Section 1983 action is pending based on search and seizure (and destruction) of cell phone photographs depicting the

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[8] Shane Bowman and Chris Willis, "We Media: How Audiences are Shaping the Future of News and Information," July 2003, The Media Center at the American Press Institute, available at http://www.mediacenter/org/mediacenter/research/wemedia/.

arrest of another individual. The U.S. Department of Justice took the extraordinary step of filing a "statement of interest" supporting the plaintiff in the case, stressing that "[t]he interests animating the Fourth Amendment's prohibition against unreasonable searches and seizures are heightened when the property at issue is also protected by the First Amendment." *Id.*, DOJ Statement of Interest, at 11 (available at http://www.justice.gov/crt /about/spl/documents/Sharp_SOI_1-10-12.pdf). The DOJ filing added that "the seizure of material protected by the First Amendment is a form of prior restraint," *id.*, and that the search incident to arrest exception did not justify the search and seizure of the cell phone in these circumstances. *Id.* at 13-14. Unfortunately, arrests in similar circumstances are not uncommon.[9]

Such disturbing cases are becoming more frequent as cell phone technology proliferates and becomes more fully integrated into newsgathering activities. To the extent cell phones are treated as just another piece of property for purposes of the "search incident to arrest" exception, the frequency with which basic rights are violated will only increase over time.

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[9] The facts of another pending civil rights action illustrate this problem (although it does not involve the search of a cell phone). In *Garcia v. Montgomery County Police*, No. 8:12-cv-03592-JFM (D. Md.), the plaintiff, an experienced photojournalist, alleges that a defendant officer illegally seized the memory card from his camera. The Department of Justice filed a Statement of Interest supporting Garcia's claims. *Id.*, DOJ Statement of Interest (available at http:// www. justice.gov/crt/about/spl/documents/garcia_SOI_3-14-13.pdf).

It therefore is necessary for this Court to clarify that a warrant is required to permit such searches. Doing so is imperative not to fashion some new right based on developing technology, but to vindicate basic guarantees of liberty as old as the Constitution itself.

B. Fourth Amendment Analysis Must Take Into Account Changes in Technology

Smart phones could not have been in the minds of the Framers when they wrote the Fourth Amendment to protect "persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const. amend. IV, but the information contained in these devices falls squarely within the amendment's purpose. As the First Circuit recognized in *Wurie*, cell phones are mini-computers that contain information of a "highly personal nature," including "photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records." 728 F.3d at 8. "It is the kind of information one would previously have stored in one's home and that would have been off-limits to officers performing a search incident to arrest." *Id.*

This reality necessarily must inform the Court's analysis of the cases now before it, as it has long sought to assure "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). This includes drawing a line so as not to permit "technology to

erode the privacy guaranteed by the Fourth Amendment." *Id.* As this Court stressed in *Jones*, 132 S. Ct. at 951 n.3, "[w]hatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment."

Past technological innovations have challenged the Court to reconcile the Framers' concern for protecting privacy with new circumstances. And while the law over time has adjusted to these changes, it has not done so immediately. In 1928, for example, this Court considered whether warrantless wiretapping violated the Fourth Amendment. At the time, it found electronic surveillance did not violate the Constitution because it was accomplished without intruding on the physical property of the defendant. The five-vote majority concluded that the Fourth Amendment "does not forbid what was done here" because "[t]he United States takes no such care of telegraph or telephone messages as of mailed sealed letters." *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

Justice Brandeis, whose views ultimately prevailed, argued in dissent that constitutional principles were undermined to the extent the Court focused excessively on the method chosen for communication. He argued forcefully that constitutions must be interpreted with technological advancements in mind to preserve fundamental rights. In particular, Justice Brandeis wrote, constitutions must be designed "to approach immortality" and "our contemplation cannot only be

what has been but of what may be." *Id.* at 472-73 (Brandeis, J., dissenting).

Foreshadowing the rise of a computer-based society, he warned that:

> Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.
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> * * *
>
> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.

Id. at 473-74.

Justice Brandeis concluded that, if the courts did not adapt to new realities, then constitutional principles would be "converted by precedent into impotent and lifeless formulas" and that "[r]ights declared in words might be lost in reality." *Id.* (internal quotation marks omitted).

Four decades later, the Court finally caught up with Brandeis. In *Katz v. United States*, 389 U.S.

347, 351 (1967), this Court declared that the Fourth Amendment "protects people, not places" and held that wiretapping is allowable only after a valid warrant is issued – the same as for any other search. The Court reasoned that "[t]o read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Id.* at 352. The decision expressly overruled *Olmstead*, replacing the previous focus on the means of communication with an appreciation of the fact of communication as the source of constitutional rights. It concluded that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied." *Id.* at 353.

The instant cases come at a seminal moment that will define the scope of constitutional protections going forward. As this Court continues to debate whether the Fourth Amendment primarily protects property or privacy, *Jones*, 132 S. Ct. at 949-52; *id.* at 958-61 (Alito, J., concurring), these cases implicate both interests: a cell phone is personal property and is an "effect" that deserves Fourth Amendment protection, and it is one that necessarily involves concerns about personal privacy. As the First Circuit observed in *Wurie*, a warrantless search of a modern cell phone "would give law enforcement automatic access to 'a virtual warehouse' of an individual's 'most intimate communications and photographs without probable cause' if the individual is subject to a custodial arrest, even for something as minor as a traffic violation." 728 F.3d at 9 (citation omitted).

Smart phones are now ubiquitous, providing capabilities that were unheard of just a few short years ago. Such mobile devices are also evolving into mobile payment devices capturing financial transactions by the owner, thus magnifying the intrusiveness of warrantless searches.[10] We are also at the dawn of the age of "wearable" devices – *e.g.*, glasses and watches and other "clothing" – that will contain even more sensitive information.[11] Whatever rule this Court fashions here will determine the level of protection accorded to these evolving technologies.

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[10] *See* Erin F. Fonté, Overview of Mobile Payments in the United States, 32 Banking & Financial Services Policy Report No. 8, 9 (Aug. 2013) (noting that "[t]he ubiquity of mobile phones is changing the way consumers access financial services (21 percent of mobile phone owners used mobile banking within last 12 months . . .)" and that "[m]obile phones are also changing the way consumers make payments (most common use was online bill payment, and 21 percent of mobile payments users transferred money directly to another person's bank, credit card or PayPal account)").

[11] *See, e.g.*, Google Glass, Google+, https://plus.google.com/+GoogleGlass/posts#+GoogleGlass/posts (last visited Mar. 6, 2014); Gary Marshall and Kate Solomon, Apple iWatch release date, news and rumors, Feb. 17, 2014, http://www.techradar.com/us/news/portable-devices/apple-iwatch-release-date-news-and-rumours-1131043 (describing available wearable technology and commenting on anticipated Apple iWatch); Memoto Lifelogging Camera, Memoto, https://www.kickstarter.com/projects/martinkallstrom/memoto-lifelogging-camera (last visited Mar. 6, 2014) ("The Memoto camera is a tiny camera and GPS that you clip on and wear.").

C. Fourth Amendment Protections Also Implicate First and Fifth Amendment Rights

The First, Fourth and Fifth Amendments to the United States Constitution are all predicated on protecting various aspects of individual privacy from governmental intrusion. The First Amendment guarantees that the government may not abridge freedom of speech, or of the press; the Fourth Amendment prohibits unreasonable searches or seizures, including those relating to a person's papers; and the Fifth Amendment protects individuals against government-coerced self-incrimination.

It is essential that the Fourth Amendment be scrupulously applied in cases that involve sophisticated communications technologies because of the inherent intrusion of warrantless searches on these other fundamental rights. Indeed, "[t]he Bill of Rights was fashioned against the background of knowledge that the unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus*, 367 U.S. at 729. This Court has long understood that "the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." *Id.* at 724.

The Constitution's Framers well understood the connection between the protection of privacy and freedom of speech, for it was a part of their common routine. Thomas Jefferson and James Madison corresponded with one another over a sixty-year period, exchanging views on politics, philosophy and

constitutional theory. "Sometimes they wrote in code (later deciphered) so thoughts they exchanged would not fall into the hands of political foes." Alan Pell Crawford, Founding Fathers' Forum, Wall St. J., Feb. 2, 1995 at A16. Before the American Revolution, colonial patriots frequently concealed their authorship or circulation of literature to avoid reprisals by English-controlled courts. *Talley v. California*, 362 U.S. 60, 65 (1960). The Letters of Junius, opposing the tea tax and other oppressive measures, were written anonymously "and the identity of their author is unknown to this day." *Id.* Similarly, some of Thomas Paine's pamphlets were written under pseudonyms. *Id.* at 63 n.3. After the Revolution, the Federalist Papers, debating the merits of the Constitution, were published pseudonymously. *Id.* at 65.

Early Fourth Amendment cases emphasized the extent to which these rights are interconnected. In *Boyd v. United States*, 116 U.S. 616 (1886), for example, this Court struck down a U.S. customs law that required a person to produce in court his private books, papers or invoices or else government allegations would be taken as confessed. The Court traced the practice of issuing general warrants to the Star Chamber, which would search a suspect's papers for evidence of seditious libel. It discussed the case of John Wilkes, publisher of the North Briton, whose house was searched pursuant to a general warrant, and his books and papers indiscriminately seized to support a libel allegation. Such events "were fresh in the memories of those who achieved our independence and established our form of government." *Id.* at 625-28. *See also*

Marcus, 367 U.S. at 724-29 ("[E]ven when the device of prosecution for seditious libel replaced licensing as the principal governmental control of the press, it too was enforced with the aid of general warrants.").

This Court found that the prohibition of such "grievous abuses" and "outrage[s]" provided by the Bill of Rights represented "the true and ultimate expression of constitutional law" and constituted "the very essence of constitutional liberty and security." *Boyd*, 116 U.S. at 625-26, 630. It stressed that

> extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime . . . is contrary to the principles of a free government. . . . [I]t is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

Id. at 631-32. In protecting such interests, the Court found that "the Fourth and Fifth Amendments run almost into each other." *Id.* at 630.

Another early case, *Ex Parte Jackson*, 96 U.S. 727, 733 (1877), established the principle that the Fourth Amendment protection for papers did not require that they be physically located in a person's home. Rather, "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be" such as "in the mail."

As in *Boyd*, the additional connection to First Amendment concerns was close to the surface. The Court discussed the attempt by President Andrew Jackson to exclude from the mails "incendiary publications" advocating the abolition of slavery in the southern states, and concluded in dictum that such a measure would "more effectually control the freedom of the press than any sedition law, however severe its penalties." *Id.* at 734 (quoting Senator Calhoun). It noted that "[l]iberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Id.* at 733.

Given our constitutional history, it is unreasonable to permit the warrantless search of a smart phone incident to arrest as if it were indistinguishable from any other piece of property. This Court has found that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973). This principle applies with particular force to the search or seizure of expressive materials, because courts must "examine what is 'unreasonable' in the light of the values of freedom of expression." *Id.* at 504.

Just as books and films cannot be compared to "instruments of a crime, such as a pistol or a knife, or contraband or stolen goods or objects dangerous in themselves," *id.* at 502 (internal quotation marks and citation omitted), neither can a cell phone. Search and seizure of a device that serves as the repository of personal communications including

photographs, documents, texts, web browsing habits, lists of associates, and much more "calls for a higher hurdle in the evaluation of reasonableness." *Id.* at 504. *Cf. Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring) ("I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year.").

II. THIS COURT MUST MAKE CLEAR THAT SEARCH OF A CELL OR SMART PHONE REQUIRES A WARRANT

The decisions now before this Court place the overlapping concerns of the First, Fourth, and Fifth Amendments in bold relief. In *Riley*, the California Court of Appeal simply locked onto what it viewed as the "key question" of merely "whether [Riley's] cell phone was personal property immediately associated with hi[m]" at the time of arrest. *People v. Riley*, 2013 WL 475242, at *4 (Cal. App. 4th Feb. 8, 2013) (quoting *Diaz*, 51 Cal. 4th at 93) (internal edits omitted). It thus treated the smart phone the same as any other piece of property, without regard to its storage capacity or other functions, or extent to which they implicate critical privacy interests.

In *Wurie*, by contrast, the First Circuit painstakingly explored the principles underlying the Fourth Amendment, the importance of requiring warrants for searches, and the exception for searches incident to arrest, carefully considering how modern smart phones fit within that framework. Tracing back to the pre-constitutional roots of the search warrant requirement, 728 F.3d at 3, 9, and the law's evolution to the "modern search-incident-to-arrest"

doctrine, *id.* at 3, the court rejected the government's urging "that a cell phone, like any other item carried on the person, can be thoroughly searched incident to a lawful arrest." *Id.* at 6. Such an approach, it found, "would give law enforcement broad latitude to search any electronic device seized from a person during his lawful arrest, including a laptop computer or a tablet device." *Id.* at 7.

The court noted that "[t]he storage capacity of today's cell phones is immense . . . , enough to hold about 'four million pages of documents,'" information that "by and large, [is] of a highly personal nature: photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records." *Id.* at 8 (citation omitted). It added that cell phones may also provide direct access to the home through the use of remote-controlled webcams, so that "[a]t the touch of a button a cell phone search becomes a house search[.]" *Id.* at 8-9 (quoting *United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012)).

In short, the issues now before the Court embody Justice Brandeis' foreboding that "[w]ays may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home." *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting). They also bring to mind the use of general warrants, by which governmental authorities would indiscriminately peruse personal papers in search of seditious writings.

The question here is not whether this Court should create new rights by divining constitutional "penumbras" and "emanations." It is whether it must preserve existing protections in the face of technological change that otherwise would allow unfettered searches to unravel guarantees for freedom of expression and against forced self-incrimination.

These interconnected rights have long been "part of the intellectual matrix within which our own constitutional fabric was shaped," *Marcus*, 367 U.S. at 729, and failure to protect them in light of changing technology would risk converting constitutional principles into "impotent and lifeless formulas" whereby "[r]ights declared in words might be lost in reality." *Olmstead*, 277 U.S. at 473-74 (Brandeis, J., dissenting).

Although the defendants in the cases below were not journalists, the issues raised by the warrantless searches of their phones incident to their arrests are of special concern to members of the press and others who use such portable electronic devices to record public events and to store private thoughts. *Amici* urge this Court to hold that a warrant must be obtained for the search of a cell phone incident to arrest because of the inherent interconnected nature of rights protected by the Fourth, First, and Fifth Amendments.

CONCLUSION

For the reasons set forth above, *Amici* respectfully ask this Court to overturn the decision of the State of California in *Riley v. State*, and affirm the decision of the First Circuit in *United States v. Wurie*.

Respectfully submitted,

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APPENDIX A

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers.

American Society of Media Photographers, Inc. represents professional publication-based photographers, and is the oldest and largest organization of its kind in the world. Its roughly 7,000 members include all manner of professional photographers whose works appear in books, magazines, newspapers, web uses, corporate reports, publicity, and advertising.

With some 500 members, American Society of News Editors (ASNE) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Association of Alternative Newsmedia (AAN) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and

Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites and licensing and syndication. The company's portfolio of locally focused media properties includes: 19 TV stations (ten ABC affiliates, three NBC affiliates, one independent and five Spanish-language stations); daily and community newspapers in 13 markets; and the Washington-based Scripps Media Center, home of the Scripps Howard News Service.

The Investigative Reporting Workshop, a project of the School of Communication at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Consortium is a network of the country's leading, progressive, independent media outlets. Our mission is to amplify independent media's voice, increase our collective clout, leverage our current audience and reach new ones.

The Media Law Resource Center, Inc. (MLRC) is a non-profit professional association for content providers in all media, and for their defense lawyers,

providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

The National Press Photographers Association (NPPA) is the nation's leading professional organization for photojournalists. NPPA's membership includes photographers, members of the press generally, and citizen journalists. As a nationally recognized authority on the right to photograph and record audio-visual images, the NPPA advocates for visual journalists in disputes involving interference with that right.

The New York Times Company is the publisher of *The New York Times*, *The Boston Globe*, and *International Herald Tribune* and operates such leading news websites as nytimes.com and bostonglobe.com.

Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers.

The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

Online News Association (ONA) is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Student Press Law Center (SPLC) is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and

responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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UNITED STATES OF AMERICA,

Petitioner,

v.

BRIMA WURIE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police, acting without a warrant, to search the digital contents of a cell phone seized by police incident to arrest, where there is no plausible risk that the cell phone presents a danger to the arresting officer or that the arrestee might destroy evidence.

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing *pro bono* legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. At every opportunity, The Rutherford Institute will resist the erosion of fundamental civil liberties that many would ignore in a desire to increase the power and authority of law enforcement. The Rutherford Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

The Rutherford Institute is interested in this case because the Institute is committed to ensuring the continued vitality of the Fourth Amendment. A decision reversing the First Circuit would effectively eliminate the warrant requirement for police searches of individuals' most personal and private

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk of the Court.

information—the contents of their cell phones—whenever a person happens to be arrested. Such a decision would erode the preference for a warrant, absent true exigent circumstances, and would jeopardize all citizens' Fourth Amendment rights.

SUMMARY OF THE ARGUMENT

First, cell phone data include extraordinary volumes of the most personal and private information an individual possesses. Such data are entitled to constitutional protection consistent with the very highest expectations of privacy.

Second, the scope of warrantless searches incident to arrest must be limited to ensure consistency with the two fundamental concerns—officer safety and evidence preservation—that justify the exception to the warrant requirement.

Third, police searches of cell phone data plainly exceed the scope of search permitted incident to arrest. Unlike seizure of the physical cell phone, warrantless police intrusion into the digital contents is unnecessary to protect the arresting officer or to guard against the arrestee destroying evidence. Absent such exigency, there is no reason to abandon the traditional—and important—benefits provided by the warrant requirement.

Finally, there is no justification for warrantless searches by police of cell phone data based on a belief that the data contain evidence of the offense of arrest. Absent exigency—and once the phone is reduced to police custody there is no exigency—there is no justification for proceeding with the search before a neutral magistrate can rule

on the search's propriety and, if appropriate, set forth its proper scope in a particularized warrant.

ARGUMENT

I. CELL PHONE DATA PRESENT THE VERY HIGHEST EXPECTATION OF PRIVACY

Cell phones contain the most personal and private information one possesses, *e.g.*, written communications and notes, financial information, health records, video and audio recordings, and photographs. They contain such data, moreover, in extraordinary volume. For example, Apple Inc. sells cell phones that offer from 16 to 64 gigabytes in storage,[2] with each gigabyte capable of holding the contents of ten yards of books on a shelf.[3] Cell phone data thus represent the modern equivalent of an individual's personal files, correspondence, and papers, which have always enjoyed a strong Fourth Amendment expectation of privacy. *See, e.g.*, *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987) (files); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (personal correspondence).

The personal and private files and records stored on cell phones are the sort that historically would have been "stored in one's home and that would have been off-limits to officers performing a search incident to arrest." *United States v. Wurie*,

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[2] *See, e.g.*, Shop iPhone, http://store.apple.com/us/buy-iphone/iphone5s (last visited April 3, 2014).

[3] *See, e.g.*, *United States v. Salyer*, No. CR S-10-0061, 2011 WL 1466887, at *1 n.2 (E.D. Cal. Apr. 18, 2011).

728 F.3d 1, 8 (1st Cir. 2013). The portability resulting from recent technological advances in digital storage does not undermine one's privacy interest in such data. A cell phone's "mobility [does not] justify dispensing with the added protections of the Warrant Clause." *United States v. Chadwick*, 433 U.S. 1, 13 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

The expectation of privacy is strengthened by recognition that any given cell phone may also contain information protected by the First Amendment or the attorney-client privilege. *See, e.g., Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("scrupulous exactitude" required where material to be searched may include constitutionally protected material) (internal quotes and citation omitted); *cf. City of Ontario, Cal. v. Quon*, 560 U.S. 746, 760 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.").

The searches at issue thus involve massive volumes of the most personal and private data. Even acknowledging that an individual has a generally reduced expectation of privacy at the time of his or her arrest, *see, e.g., Maryland v. King*, 133 S. Ct. 1958, 1978 (2013), the balance of private and government interests here requires application of the traditional warrant requirement.

II. THE FOURTH AMENDMENT LIMITS THE SCOPE OF SEARCHES INCIDENT TO ARREST TO WHAT IS NECESSARY TO PROTECT THE ARRESTING OFFICER OR TO PRESERVE EVIDENCE

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (internal quotes and citation omitted). This requirement that police secure a warrant is "subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (internal quotes and citation omitted).

The exceptions to the warrant requirement "have been jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958). They are justified only by "a showing by those who seek exemption" from the warrant requirement that "the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948).

This case involves the warrant exception for searches incident to arrest. As the Court has repeatedly explained, two specific exigencies justify warrantless search in this situation: "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v. Iowa*, 525 U.S. 113, 116-17 (1998) (citations omitted).

A. Police Need Not Prove on a Case-by-Case Basis that a Search Will Produce Weapons or Endangered Evidence

United States v. Robinson, 414 U.S. 218 (1973), makes clear that there is no need for the police to consider, case-by-case, whether searching the person of an arrestee is likely to find a weapon or to prevent destruction of evidence. In *Robinson*, police searched an arrestee's person, finding a crumpled cigarette pack that contained "objects" that the officer could not identify. *Id.* at 222. Concerned that unidentified objects might be weapons such as a razor blade or live bullets, *see United States v. Robinson*, 471 F.2d 1082, 1118 (D.C. Cir. 1972) (Wilkey, C.J., dissenting), the officer examined them and discovered heroin. 444 U.S. at 222.

The Court explained that the "authority to search the person incident to a lawful custodial arrest, while based on the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.* at 235. Rather, "[i]t is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.*

B. Police Must Limit the Scope of the Search to What Is Reasonably Necessary to Locate Weapons or Endangered Evidence

Though *Robinson* makes clear that the fact of arrest—without more—justifies a search incident to arrest, the Court has uniformly insisted that the *scope* of that search be consistent with the exigencies justifying the exception in the first place. In *Chimel v. California*, 395 U.S. 752 (1969), for example, the Court rejected the notion that police could search the arrestee's entire house incident to his arrest at that location. Because the scope of searches incident to arrest "must be strictly tied to and justified by the circumstances which rendered its initiation permissible," police were required to limit their search to "the arrestee's person and the area 'within his immediate control'—*construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence.*" 395 U.S. at 761, 762-63 (emphasis added and citation omitted).

In *United States v. Chadwick*, 433 U.S. 1 (1977), similarly, the Court found that police could not search, incident to arrest, a locked footlocker defendant had placed in the still-open trunk of his automobile. Searching the footlocker would address neither of the exigencies justifying the search-incident-to-arrest exception: "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy

evidence, a search of that property is no longer an incident of the arrest." *Id.* at 15 (footnote omitted).

In *Arizona v. Gant*, 556 U.S. 332 (2009), finally, the Court found it unreasonable for police to search the interior of an arrestee's car after the arrestee was safely locked in the patrol car. The Court squarely re-affirmed *Chimel*'s holding that searches incident to arrest could encompass only "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Id.* at 339 (quoting *Chimel*, 395 U.S. at 763; internal quotes omitted). Warrantless searches outside that clearly defined scope do not survive Fourth Amendment scrutiny: "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.*

III. THE FOURTH AMENDMENT DOES NOT PERMIT THE WARRANTLESS SEARCH OF CELL PHONE DATA INCIDENT TO ARREST, BECAUSE THERE ARE NO EXIGENCIES TO JUSTIFY THE EXEMPTION

A. There Is No Exigent Need to Search Cell Phone Data at the Time of Arrest

The police unquestionably have the right to search an arrestee's person and to seize the arrestee's physical cell phone. *See, e.g., Robinson*, 414 U.S. at 235. But neither of the concerns that underlie the search-incident-to-arrest exception—

securing weapons and destructible evidence—justifies going further and conducting a warrantless search of the cell phone's data.

Such a search is plainly not necessary to "disarm the suspect." *Knowles*, 525 U.S. at 116. Any concern that the arrestee might try to hurt the arresting officer with the cell phone is addressed fully once the officer has taken the phone into physical custody. *See Chadwick*, 433 U.S. at 15 (noting that once police had reduced luggage "to their exclusive control," there was no longer any danger that "the arrestee might gain access to the property to seize a weapon") (footnote omitted).

Nor is a warrantless search of cell phone data necessary to preserve evidence, for at least three independent reasons. *First*, once the police have taken both the arrestee and the cell phone into custody, there is no plausible risk that the *arrestee* will destroy evidence (*e.g.*, by remotely "wiping" the cell phone). Third parties might theoretically try to wipe the phone or otherwise destroy evidence, but the focus of the search-incident-to-arrest exception is on the potential actions of the *arrestee*, not third parties. *See Chadwick*, 433 U.S. at 15 (focusing on "danger that the *arrestee* might gain access to the property to seize a weapon or destroy evidence") (emphasis added and footnote omitted); *Chimel*, 395 U.S. at 768 (disapproving search that "went far beyond the petitioner's person and that area from within which *he* might have otherwise obtained either a weapon or something that could have been used as evidence against him") (emphasis added).

The Court has never held or suggested that the search-incident-to-arrest exception permits warrantless searches to prevent *third parties* from destroying evidence in response to the arrest of their associate. Because there was no plausible risk that the *arrestee* would destroy the cell phone's data once police had seized the phone, there was no exigency justifying a warrantless search.

Second, the United States offers no evidence that the risk of remote cell phone wiping is any more than ephemeral. *See, e.g.*, *Gant*, 556 U.S. at 352 (Scalia, J., concurring) (noting that the government had failed to provide "a single instance" in which a formerly restrained arrestee had escaped and retrieved a weapon from his vehicle); *United States v. Jeffers*, 342 U.S. 48, 51 (1951) ("the burden is on those seeking the [warrant] exemption to show the need for it") (citation omitted). Millions of Americans are arrested every year in possession of cell phones. If the United States is unable to offer a single example of "remote wiping" that has actually taken place, it is difficult to view the risk as anything more than purely theoretical.

Finally, even if remote cell phone wiping were a non-trivial concern, police can eliminate the risk in numerous ways less intrusive than warrantless search. As the briefs before the Court amply demonstrate, police can eliminate the risk entirely through routine steps, including: (a) turning the cell phone off (*see, e.g.*, Brief *Amicus Curiae* of the DKT Liberty Project in Support of Petitioner at 12-13, *Riley v. California* (No. 13-132)); (b) removing the cell phone's battery (*see, e.g.*, Brief of *Amicus Curiae* Electronic Privacy Information Center (EPIC) and

Twenty-Four Technical Experts and Legal Scholars in Support of Petitioner at 34, *Riley v. California* (No. 13-132)); (c) placing the cell phone in an inexpensive Faraday bag or in aluminum foil (*id.* at 36-39; Brief of *Amici Curiae* Criminal Law Professors in Support of Petitioner at 4-12); or (d) copying the cell phone's data (*see, e.g.*, Brief for Petitioner at 22-24, *Riley v. California* (No. 13-132)).

B. Absent Exigent Circumstances, There Is No Reason to Abandon the Recognized Benefits of the Warrant Requirement

Because there is no need immediately to search the digital contents of an arrestee's cell phone, there is no legitimate reason to abandon the traditional benefits of the warrant requirement. Upholding the warrant requirement in this context would not deny the police access to evidence, it would simply permit the probable cause determination to be made by a neutral and detached magistrate instead of by police. *See Coolidge*, 403 U.S. at 449.

Applying the traditional warrant requirement will also ensure that any police search is carefully limited to the specific areas of cell phone data for which there is probable cause. The Framers adopted the Fourth Amendment, in part, to guard against abuses of the English "general warrant," which allowed officers of the Crown to "search where they pleased." *Stanford v. Texas*, 379 U.S. 476, 482 (1965) (citation omitted). Accordingly, this Court has repeatedly instructed that the Fourth Amendment forbids police from "indiscriminate

rummaging" through an individual's papers and records. *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 62 (1974); *see Coolidge*, 403 U.S. at 467 (Amendment forecloses "general exploratory rummaging").

Instead, the Fourth Amendment requires a particularized warrant in which a neutral magistrate specifies the exact parameters of the permissible search. *See Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (noting the requirement that warrants be particular); *Maryland v. Garrison*, 480 US. 79, 84 (1987) (warrant must define "the specific areas and things for which there is probable cause to search") (citations omitted).

Given the vast amount of data stored on modern cell phones, this narrowing and limiting feature of the warrant requirement is particularly important. Cell phone digital data represent the equivalent of bookshelves of an individual's papers and records. Absent exigent circumstances, the Fourth Amendment's fundamental purposes are best served by required a particularized warrant that clearly defines the specific portions of that data the police have probable cause to search.

C. The United States Identifies No Precedent Supporting the Warrantless Search of Cell Phone Data

The United States argues that the Fourth Amendment affords police unlimited discretion to search anything found on an individual's person at the time of arrest, without regard to the scope of the search or the need to secure weapons and prevent destruction of evidence. This is not so.

Robinson (*see* Pet'r Br. at 17-18) is a straightforward example of the police's unquestioned right to search an arrestee's person to "remove any weapons" and to "search for and seize any evidence on the arrestee's person *in order to prevent its concealment or destruction.*" 414 U.S. at 226 (emphasis added) (internal quotation marks and citation omitted). While frisking an arrestee, police found a crumpled cigarette pack. It contained "objects" that the police officer could not identify, though he "knew they weren't cigarettes." *Id.* at 223. Concerned that that the unidentified objects might be weapons such as a razor blade or bullets, *see* 471 F.2d at 1118, the officer examined them and discovered heroin.

The most straightforward reading of *Robinson* (as well as cases like *Michigan v. DeFillippo*, 443 U.S. 31 (1979) and *Gustafson v. Florida*, 414 U.S. 260 (1973) (*see* Pet'r Br. at 24)), is that an officer, having found unidentified objects that might be dangerous, was justified in investigating to determine what they were. *Nothing* in *Robinson*, *DeFillippo*, or *Gustafson* suggests that the police could have opened the cigarette pack to see if it contained internal writing, let alone approves a search of cell phone data that is plainly neither dangerous nor in danger of destruction while the police secure a proper warrant.

United States v. Edwards, 415 U.S. 800 (1974) (*see* Pet'r Br. at 18-19), explicitly disclaimed any *per se* rule eliminating the warrant requirement as applied to "postarrest seizures of the effects of an arrestee." 415 U.S. at 808 (footnote omitted). To the contrary, the *Edwards* decision held only that arrest

reduced an individual's privacy interests—"for at least a reasonable time and to a reasonable extent" with respect to "weapons, means of escape, and evidence." *Id.* at 808-09.

People v. Chiangles, 142 N.E. 583 (N.Y. 1923) (*see* Pet'r Br. at 25), similarly, stands for the unremarkable principle that an arresting peace officer "must be empowered to disarm" and if "he may disarm, he may search, lest a weapon be concealed." *Id.* at 584. To the extent this search discovers documentary or other evidence of guilt, the police of course seize such "fruits or evidences of crime." *Id.* (citation omitted). This is also the substance of *Welsh v. United States*, 267 F. 819 (2d Cir. 1920) (*see* Pet'r Br. at 25).

Hill v. California, 401 U.S. 797 (1971), and *Marron v. United States*, 275 U.S. 192 (1927) (*see* Pet'r Br. at 26), are simply examples of pre-*Chimel* decisions upholding broad searches of the arrestee's premises at the time of the arrest. It is unlikely that the Court would have upheld the searches in either *Hill* or *Marron* had they been decided under the Fourth Amendment principles clarified in *Chimel*.

Nor is there any principled or logical basis for the United States' proposed distinction between a cell phone found on the *person* of an arrestee—which it argues can be searched without limitation—and one found *next* to the arrestee at the time of the arrest (which the United States concedes is subject to warrantless search only if some exigent circumstance is present). *See* Pet'r Br. at 8-9.

Wholly apart from the absurdity of the warrant requirement turning on a few inches

location at the time of arrest, this Court has made clear that the warrant requirement can be dispensed with only where the "*balance* of privacy interests and governmental interests" justifies doing so. *See Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 666 (1989) (emphasis added). The government's argument that "the reduced expectations of privacy triggered by the fact of arrest," Pet'r Br. at 19 (citation omitted), justify a *per se* rule allowing unlimited warrantless search of anything found on the arrestee's person entirely ignores the other side of that crucial balancing test. That is, even if the balance of interest justified a warrantless search of the unidentified cigarette pack objects in *Robinson*, a very different balance is presented by the voluminous personal files contained in the data memory of a cell phone.[4]

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[4] There are lower court decisions upholding searches of, for example, paper notes contained in the arrestee's wallet and telephone numbers from a pager found on the arrestee's person. *See Wurie*, 728 F.3d at 15-16 (Howard, C.J., dissenting) (collecting cases). To the extent these cases approve searches that go beyond the reasonable scope necessary to guard against weapons or the arrestee's destruction of evidence, we respectfully submit that they were wrongly decided for the reasons discussed above.

D. Nor Is It Reasonable to Permit Warrantless Searches of Cell Phone Data Based on Reason to Believe the Data Contains Evidence of the Offense of Arrest

Equally meritless is the United States' alternative argument that warrantless searches of cell phone data are permitted whenever there is a basis to believe the data contain evidence related to the offense of arrest. *See* Pet'r Br. at 45-48. Once the police have seized the cell phone and reduced it to custody, there is no appreciable risk the arrestee could use it as a weapon or destroy any evidence it might contain. *See supra* § III(A). Absent such exigency, there is no justification for proceeding with the search before a neutral magistrate can rule on its propriety and, if appropriate, define its proper scope through a particularized warrant. *See supra* § III(B).[5]

CONCLUSION

Police can and will routinely search the persons of those they arrest. They will seize cell phones as found. Once they have taken a cell phone into their custody, there is no remaining danger that

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[5] Similarly, there is no justification for the United States' suggestion that the police be permitted to decide the search's propriety based on a balancing of governmental and private interests. *See* Pet'r Br. at 49-55. Absent exigency, there is no reason that the balancing of these interests should not be done by a neutral magistrate in the course of deciding whether to issue a warrant. *See supra* § III(B).

the arrestee could use the cell phone to injure the arresting officer or to destroy evidence. Under these circumstances, the "justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 556 U.S. at 339.

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